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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 613 October Term, 1957

NORMAN W. MOON,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO THE SUPREME COURT OF PENNSLYVANIA

LOUIS C. GLASSO,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, NORMAN W. MOON, by its undersigned attorneys and counselors, prays that a writ of certiorari issue to review the judgment entered in this case on May 27, 1957, by the Supreme Court of Pennsylvania affirming the sentence of death imposed upon petitioner January 10, 1957 by the Court of Oyer and Terminer of Warren County, Pennsylvania; and the judgment of the Supreme Court of Pennsylvania entered on October 3, 1956 affirming the decision of the Court of Oyer and Terminer of Warren County, Pennsylvania, of March 29, 1956, directing that proceedings in the cause should continue, notwithstanding the fact that a professionally qualified Sanity Commission, duly appointed by the Court of Oyer and Terminer of Warren County in accordance with the statutory procedure then in force in the Commonwealth of

Pennsylvania, had unanimously made findings pursuant to the Mental Health Act of June 12, 1951, P. L. 533, 50 P. S. 1224-1225 that petitioner Norman W. Moon was in fact mentally ill, of dementia praecox of the paranoid type, and that said illness was chronic and continuing, and that said Norman W. Moon was a proper subject for commitment to a mental hospital.

Opinions Below

1. Opinion of Supreme Court of Pennsylvania rendered May 27, 1957 affirming conviction of Murder and sentence of death penalty reported in 388 Pa. 304. Appendix A, at page 1a.

2. Opinion of Supreme Court of Pennsylvania dated October 3, 1956 affirming Warren County Court's setting aside the finding of the Sanity Commission that petitioner is "Mentally Ill" under the Pa. Mental Health Act of 1951. Reported in 386 Pa. 296, Appendix B, hereto, at page 11a.

3. Opinion of Supreme Court of Pennsylvania rendered October 4, 1955, reported in 383 Pa. 318 and printed in Appendix C at page 37a, reversing the Warren County Court in its interpretation of the Penna. Mental Health Act of 1951.

4. Opinion of the Warren County Court dated January 28, 1956 holding petitioner not to be "Mentally Ill" within the meaning of Penna. Mental Health Act of 1951 after remand by Penna. Supreme Court for further proceedings consistent with its opinion reported at 383 Pa. 318. Appendix D at page 63a.

Jurisdiction

The judgment of the Supreme Court of Pennsylvania affirming death sentence imposed upon petitioner was entered on May 27, 1957, pursuant to proceedings had in pursuance of a judgment of the Supreme Court of Pennsylvania which was entered on October 3, 1956 in a collateral proceeding instituted under the Mental Health Act of 1951 upon the petition of the Sheriff of Warren County, who had custody of petitioner Norman W. Moon.

The jurisdiction of the Court is invoked under 28 U. S. C. 1257 (3) and 28 U. S. C. 2101 (d).

Questions Presented

Whether it is a violation of the Constitution of the United States, a taking of petitioner's life without due process of law, and a denial of fundamental fairness inconsistent with the basic principles of justice and fair play which lie at the foundation of a free society and are implicit in the concept of ordered liberty, for the Commonwealth of Pennsylvania to execute the sentence of death imposed upon petitioner in pursuance of judicial action which arbitrarily, capriciously, and in reliance upon the testimony of lay witnesses and the trial judges own medical diagnosis as a layman, contrary to the undisputed evidence of highly qualified medical specialists selected by the trial judge and to the findings of the well qualified Sanity Commission appointed by him disregarded and set at naught the statutory post-conviction procedure prescribed by Pennsylvania legislation for determining petitioner's mental condition.

Statute Involved

The Pennsylvania Mental Health Act of June 12, 1951 P. L. 533, 50 P. S. 1224-1225 provides in pertinent part:

Sec. 1224.1 Petition for the commitment of any person detained in any penal or correctional institution who is thought to be mentally ill or in such condition that he requires care in a mental hospital * * * may be made to the court under the order of which such person is detained.

(a) Within ten days of the receipt of an application for commitment, the clerk of court shall cause to be served written notice of the filing of the application on the prisoner's counsel, if he has any, and on his nearest available relative, or, in the absence of such, his nearest available friend, and shall endorse on the application the names of those notified. Thereupon, the court shall order an examination of the person sought to be committed by two qualified physicians or a commission. Notice of the time and place of the psychiatric examination shall be given to the persons whose names are endorsed on the application by the clerk of court as aforesaid.

* * *

(d) If the court is satisfied that the person sought to be committed is mentally ill or mentally defective, it shall order the commitment or transfer of such person to a mental hospital or an institution for mental defectives.

Sec. 1202. (a) Whenever petition is made to a court for an order for the commitment of any person thought to be mentally ill to a hospital, the court may immediately appoint a commission to inquire into and report upon the facts in the case.

(b) Such commission shall be composed of three persons, two qualified physicians and an attorney at-law, who shall prepare and file all necessary notices, reports and other papers. Each member of the commission shall receive a fee consistent with the prevailing scale in the county, as determined by the court, for the time he is necessarily employed in the duty of his appointment.

(c) The commission shall hear such evidence as may be offered or as they may require relating to the mental condition of the person sought to be committed, as well as his or his counsel's statement. If such person shall refuse to submit to an examination before the commission, the court may issue a warrant to bring him before the commission for examination.

(d) The commission shall make a written report to the court setting forth whether or not they find that the patient is in fact mentally ill and a proper subject for commitment to a hospital, and the facts on which their conclusion is based. 1951, June 12, P. L. 533, art. III, sec. 327; 1951, Jan. 14 (1952), P. L. 2053, sec. 9.

Sec. 1072. (11) "Mental illness" shall mean an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include "insanity", "unsoundness of mind", "lunacy", "mental disease", "mental disorder", and all other types of mental cases, but the term shall not include "mental deficiency", "epilepsy", "inebriety", or "senility", unless mental illness is superimposed.

Statement of the Case

The case at bar is an outgrowth of the shocking tragedy which occurred on January 13, 1954, when petitioner Norman W. Moon, who was in court in Warren County, Pennsylvania on a non-support charge, drew a gun and fired six bullets in various directions, the last two of which were fatal to the presiding judge, Hon. Allison D. Wade. Later defendant shot himself in the neck. After recovery, he was indicted, arraigned, tried, and convicted of murder in the first degree. The jury's verdict, rendered on May 25, 1954, fixed the penalty at death. On the same date defendant filed motion for a new trial, and leave was granted by the trial court to file other and additional reasons after the testimony was transcribed.

Meanwhile, a collateral proceeding under the Mental Health Act of June 12, 1951, P. L. 533, 50 P. S. 1224 was instituted, while defendant was detained in the Warren County jail, upon the petition of the Sheriff of Warren County, who had custody of defendant. On July 31, 1954, the Court appointed a Sanity Commission composed of

Dr. Robert H. Israel, Dr. W. S. Walters, and R. Pierson Eaton, Esq., who were exceptionally well qualified to fulfill the duties for which they were appointed, as set forth in the trial court's opinion of October 21, 1954:

"*the Court has full faith in the competence of Dr. Israel.* His qualifications (Sanity Commission record page 3) include membership on the Warren State Hospital staff for twenty-eight years, Superintendent for nineteen years, Fellow of the American Psychiatric Association for more than twenty years, member of the Pittsburgh Neuro-Psychiatric Association, the Pennsylvania Neuro-Psychiatric Association, the Pennsylvania Medical Association, Warren County Medical Association, and President of the Pennsylvania Neuro-Psychiatric Association. *The Court also has faith in his integrity and is fully confident that he performed his duties as a member of the Commission objectively and fairly. He is incapable of being influenced by prejudice.* The Court has been personally acquainted with Dr. Israel for twenty years.

The Court has equal faith in the integrity of the other two members of the Sanity Commission and in their qualifications and ability to fulfill their duties as members of the Commission. The qualifications of Dr. William S. Walters (Sanity Commission record page 3) show him to be a graduate of the University of Pennsylvania Medical School, licensed to practice in Pennsylvania, and engaged in the general practice of medicine in Warren, Pennsylvania, since 1947; a member of the American Medical Association, the Pennsylvania State Medical Association and the Warren County Medical Association. The Court believes Dr. Walters to be particularly well qualified for examination and report on the condition of the defendant because Dr. Walters 'attended Norman Moon as a medical man from the start.' He 'was assisting Dr. Cashman (surgeon) at the table when he (defendant) first came in on January 13th and treated him during his stay in the Warren General Hospital.' After defendant was transferred from the Warren General Hospital to the Warren County Jail on January 29,

1954 (Sanity Commission record page 7) Dr. Walters saw him 'perhaps weekly for about a month, and then the visits tapered off to anywhere between one and three weeks except upon the call of the jail to come over and administer to minor problems that came up about his diet, bowels, sedation, many things.' (Sanity Commission record page 46.) Dr. Walters also examined him when he caused trouble on two occasions as a prisoner in the Warren County Jail (Sanity Commission record pages 46, 47 and 48). The third member of the Commission, R. Pierson Eaton, Esq., has been personally known to the Court for twenty years. He was admitted to practice before the Supreme Court of Pennsylvania and the courts of the 37th Judicial District in 1927 and since that time has been engaged in the active practice of the law in Warren, Pennsylvania. He is a member of the Federal Bar and of the Pennsylvania and Warren County Bar Associations. *The Court is well satisfied with the qualifications of the members of the Sanity Commission, and with the investigation made by them.*" (R. 143a-144a, italics supplied.)

Defendant was denied the opportunity to submit independent medical testimony to the Commission (R. 86a, 142a), but the Commission heard the testimony of several witnesses including Dr. Russell J. Meadows, Senior Physician of the Warren State Hospital (R. 102a), and of a Psychologist at that hospital (R. 95a), and also personally made a professional examination of defendant (R. 113a, 62a, 119a). The doctors were alert to the possibility of deception or faking, but as the result of their examination concluded that "malingering can be ruled out" (R. 63a, 109a, 115a).

On October 13, 1954 the Commission made its unanimous report (R. 118a-125a), in which, after making detailed findings of subsidiary facts it found the following ultimate facts (paragraph 19 of Report of Sanity Commission):

"a. Norman W. Moon is in fact mentally ill.
b. Norman W. Moon's mental illness is that of dementia praecox of the paranoid type.
c. This illness is chronic and continuing.
d. Norman W. Moon is a proper subject for commitment to a mental hospital." (R. 123a-124a.)

Instead of committing defendant to a mental hospital in accordance with the mandate of 50 P. S. 1225 (d), the trial court, being of opinion that the Mental Health Act of 1951 had not changed the concept of insanity embodied in the prior Act of 1923, concluded, upon the basis of the Commission's answer to three additional questions propounded by the Court, that Moon was "legally sane and proceedings in his case shall continue" (R. 124a-125a, 161a).

On appeal the Supreme Court of Pennsylvania in *Commonwealth v. Moon*, 383 Pa. 18, decided October 4, 1955, held that the difference in terminology in the 1951 Act changed the legal standard to be applied and remanded the case for procedure consonant with that decision.

The Supreme Court of Pennsylvania stressed that, under the statutory definition of "mental illness" in 50 P. S. 1072 (11), the "determinative issue" was whether Moon's illness "*so lessened* his capacity to use his customary self-control, judgment and discretion" in the conduct of his affairs and social relations as to render it "necessary or advisable for him to be under care" (383 Pa. at 28-29. Italics those of the Court).

On December 12, 1955 the trial judge heard additional testimony offered by the Commonwealth of prison guards at the Western State Penitentiary regarding defendant's behavior in that institution, where he was then confined.

On January 28, 1956 the trial judge rendered an opinion and order (R. 257a-279a), directing "that proceedings in this case shall continue". Defendant's exceptions filed on February 14, 1956 (R. 280a-289a) were dismissed by the trial judge's opinion and order of March 29, 1956 (R. 209a-313a).

In the trial judge's opinion of January 28, 1956, he found that the Sanity Commission had made no findings with respect to the "determinative issue" or "crucial question" whether defendant's mental illness "so lessened" his capacity to use his customary self-control, judgment, and discretion as to render it necessary or advisable for him to be under care (R. 264a).

The trial judge further found "that when the Commission found the defendant to be 'mentally ill' it was using the term 'mentally ill' in a purely medical sense and not in the light of the definition of 'mental illness' as contained in the Act" (R. 266a).

The trial judge went on to say that if the assumption be made that the Commission was using the term "mentally ill" in the light of the statutory standard, he must reject the Commission's findings for lack of support in the evidence (R. 266a). This conclusion is drawn by the trial judge from his own evaluation as a medical layman of the acts, words, attitudes, and mannerisms of defendant Moon. In the trial judge's evaluation of these medical symptoms, those symptoms do not indicate a mental illness as defined in the 1951 Act. Although the trial judge finds that the symptoms justified the Commission's "purely medical diagnosis" of dementia praecox, paranoid type, he holds that such a mental disorder is not "a mental illness as defined in the 1951 act" (R. 267a).

The trial judge expressed "doubts as to whether the diagnosis is justified" because "it seems likely to him" that defendant's symptoms "are caused by the predicament in which the defendant finds himself * * *, and also the stress of his confinement and the contemplation of his fate, rather than a disease of the mind" (R. 263a).

The trial judge then reviewed (R. 271a-277a) the testimony of prison guards at the Western State Penitentiary regarding defendant's behavior in that institution. This testimony, given on December 12, 1955, showed that the defendant received visitors, wrote letters, ate candy, read books and magazines, and did not commit any breach of prison discipline or misconduct. The trial judge regarded this evidence as "of considerable value" in determining the current situation, since more than fifteen months had elapsed since the Sanity Commission's report of October 13, 1954 (R. 277a).

The trial judge found that the Commission's finding that the defendant was a proper subject for commitment to a medical hospital "was well justified as a medical matter" and that "no doctor worthy of the name could make such a diagnosis without recommending treatment." He likewise regarded it as "largely a medical matter" whether defendant's capacity to exercise his customary self-control, judgment, and discretion was "lessened" by such mental disorder. But he went on to say that "the final and conclusive question" whether such capacity had been "so lessened" as to make it necessary or advisable for him to be under care "is not a medical matter" but a question which "may be intelligently answered not only by psychiatrists and doctors but by experienced laymen who have had sufficient contact with and opportunity to observe the conduct of the defendant, such as the prison guards who

testified in this case. Their testimony has been valuable to the Court" (R. 277a).

In the trial judge's opinion of March 29, 1956 dismissing defendant's exceptions he made findings which conflict somewhat with those in his opinion of January 28, 1956, as well as with each other.

The trial judge in his opinion of March 29, 1956 accepts very definitely the correctness of the medical diagnosis made by the Sanity Commission (R. 296a, 297a).

The trial judge now also definitely indicates that he "made the assumption that the Sanity Commission found the defendant mentally ill as defined in the Mental Health Act of 1951" (R. 300a, 311a).

The trial judge also asserts strongly in his opinion of March 29, 1956 that he gave no great weight to the testimony of the prison guards (R. 303a).

The trial judge also re-affirmed his satisfaction with the professional competence of the Sanity Commission and the adequacy of their diagnosis (R. 304a-306a), and reasserted the propriety of the Court's refusal to permit defendant to offer independent medical testimony (R. 307a-308a).

The trial judge reiterated that "in arriving at his ultimate conclusion he assumed that the Sanity Commission applied the statutory standard in making its report. There was nothing in the record to persuade the Court to believe that the report should be supplemented by more recent data due to the lapse of time" (R. 311a).

The trial judge's decision of March 29, 1956 was affirmed on appeal by the Supreme Court of Pennsylvania on October 3, 1956 (386 Pa. 206).

Defendant's original and additional reasons for a new trial were then disposed of by the trial judge in an opinion of January 10, 1957. Sentence of death was imposed on the same date.

Petitioner's contentions regarding the due process issue were raised in the trial court in petitioner's exceptions (R. 280a-88a); and also were urged in the Supreme Court of Pennsylvania, as shown by petitioner's briefs in that court, which are appended hereto as Appendix D.

On September 20, 1957 an application for habeas corpus was made in the District Court for the Western District of Pennsylvania. After hearing the application was denied on October 10, 1957 upon the ground that petitioner had not applied to this Court for certiorari, and hence had not exhausted "available State remedies" as conceived in cases such as *Darr v. Burford*, 339 U. S. 200 (1950) and *Brown v. Allen*, 344 U. S. 433 (1953).

The Governor of Pennsylvania has set November 18, 1957 as date for execution of the petitioner.

Specifications of Error to be Urged

The Supreme Court of Pennsylvania erred in:

(1) Deciding that the constitutional rights of the petitioner were not violated under the Fourteenth Amendment to the Constitution of the United States in as much as the trial judge did not abuse his discretion in setting aside the unanimous findings of a Court appointed Sanity Commission and that the trial judge did fairly interpret and follow the provisions of the Penna. Mental Health Act of 1951.

(2) In failing to grant a new trial to the petitioner.

Reasons for Granting the Writ

1. The decision of the Supreme Court of Pennsylvania in affirming the judgment and sentence of the trial court and in holding that there was not a denial of due process presents the question of what is the true meaning and import of the Fourteenth Amendment which guarantees every citizen a fundamental sense of fairness consistent with the very concept of justice. Is the requirement of due process of law satisfied when a State judge disregards and sets at naught a statutory procedure for the commitment of mentally ill prisoners by the exercise of arbitrary and capricious action in setting aside the unanimous findings of a Sanity Commission appointed by him to determine the existence of mental illness which is a purely medical question.

2. The statutory procedure in Pennsylvania makes commitment to a mental institution mandatory if after a Sanity Commission makes a finding that the defendant is in fact mentally ill, and the proper subject for commitment to a hospital, the Court is satisfied that the person to be committed is mentally ill. Here the trial judge's opinion definitely shows that he is satisfied with the correctness of the Sanity Commission's findings as a medical diagnosis, but attempts to escape from the legal consequences of such a diagnosis, as prescribed by mandatory legislation, by holding that the professional skill of a medically qualified Sanity Commission extends only to the determination regarding the *existence* of mental illness but withdraws from the competence of the medical profession the determination of the *degree* or *character* of such a disorder.

3. The question presented here is of particular importance to the petitioner herein whose very life depends upon the true meaning of his constitutional rights.

ARGUMENT

The Petitioner is being deprived of his life without due process of law in violation of the Fourteenth Amendment to the U. S. Constitution because of the capricious and arbitrary judgment of the trial judge in refusing to accept the findings of a Sanity Commission, appointed by him, which unanimously found the Petitioner "mentally ill" and a fit subject for mental institutionalization.

While it may be debatable and unsettled whether a State is under any federal constitutional duty to provide a post-conviction procedure for determining a defendant's mental condition before executing a death sentence (Solesbee v. Balkom, 339 U. S. 9; Nobles v. Georgia, 168 U. S. 398), we contend that when a State in fact has established such a statutory procedure, as Pennsylvania has done here; it is plainly a violation of due process for a State judge to completely disregard and set at naught such statutory procedure by arbitrary and capricious action which offends against a sense of fundamental fairness. Pennsylvania forbids the execution of an insane man. Com. v. Ragone, 317 Pa. 113. In conformance with humanitarian policy, Pennsylvania passed the Act of June 12, 1951 P. L. 553 which amended the earlier Act of 1923 P. L. 998 of July 11, which did not apply to persons under sentence of death. Com. v. Sullivan, 86 Pgh. L. J. 205. The 1951 Act provides for the appointment of a sanity commission of at least two qualified physicians (Sec. 1225) and the commitment of a person, accused or convicted (Sec. 1224) to a mental hospital if found to be "mentally ill" (1072). Mental illness is defined by Sec. 1072 as being:

> "Any illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of affairs and social relations

> as to make it necessary or advisable for him to be under care. The term shall include 'insanity', 'unsoundness of mind', 'lunacy', 'mental disease', 'mental disorder' and other types of mental cases but shall not include 'mental deficiency', 'epilepsy', 'inebriety', or 'senility' unless mental illness is superimposed."

After conviction and before imposition of death sentence, the Sheriff of Warren County, petitioned the trial Judge for the appointment of a commission. The Court appointed two eminently qualified psychiatrists and a prominent member of the Bar. The Commission took testimony which included that of a State hospital pyschologist and psychiatrist. Both the Commonwealth and defendant were ordered not to and did not offer any evidence. Witnesses called were prison guards who observed him in the Warren jail and certain members of the Warren State Hospital to where he was removed by Order of Court for study. The Commission unanimously found that Moon was suffering from *dementia praecox of the paranoid type,* chronic and continuing and mentally ill. The trial Judge extolled the qualifications of the commissioners but held in effect that the Pennsylvania Mental Health Act did not supercede the concept of insanity embodied in the Act of 1923, to wit, M'Naghten Rule. The Supreme Court of Pennsylvania, holding that the legal standard to be applied had been changed by the Act of 1951, remanded the case for proper determination by the trial Judge in accordance with its decision. Com. v. Moon, 383 Pa. 18.

The trial Judge then heard witnesses who were guards at a different institution and a physician. Their testimony related to his physical condition and routine habits of the petitioner at that institution. The trial Judge then set aside the Commission's findings as being "purely medical diagnosis" and substituted his own as a lay person on the

ground that "it seemed likely to him" that the defendant's symptoms "are caused by the predicament in which the defendant finds himself in [illegible] and also the stress of his confinement and the contemplation of his fate, rather than a disease of the mind."

The trial Judge then decided that the crucial question, to wit whether Moon's capacity was *so lessened* as to make it necessary or advisable for him to be under care, "was not a medical matter" but one which could be answered by laymen. This decision, we contend, was arbitrary, capricious and an abuse of judicial discretion. The trial Judge certainly realized that the mental condition of Moon, at the time of the appointment of the Commission, was purely a condition to be determined by men trained and qualified in medicine and psychiatry. He named to the Commission, Dr. Isreal, a personal friend and Superintendent of the Warren State Hospital, Dr. Walters, a physician who had treated Moon when he shot himself and an eminent member of the Warren County Bar, Mr. Eaton. This Commission, after hearing from other men trained in analyzing human behavior, made its unanimous finding of "mental illness", which was set aside. It must be remembered that the trial Court made the selection and appointment of this Commission and not the defendant. He extolled their qualifications, accepted the findings and then by "legal legerdemain" casted them aside. If the purpose of the appointment of the Commission was to seek medical advise for the conscience of the Court to the end that it could exercise "judicial discretion", then to set for naught that solicited and technical advise for the reason advanced by the trial Judge surely constituted failure to exercise "reasonable discretion".

In Osborn v. U. S. Bank, p. Wheat, 738, 866, Chief Justice Marshall said:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of a Judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

If in reaching a conclusion, the law is departed from or misapplied, or the judgment exercised is manifestly unreasonable as shown by the evidence or the record, discretion is then abused and should be corrected. Maxwell v. Enterprise Wallpaper Mfg. Co. *et al.*, 131 F. 2d 400. Here, the record shows that the trial Judge sought to give purpose not to the will of the Pennsylvania Legislature (to commit mentally ill persons, under sentence of death or not, in accordance with humanitarian policies) but to his own will. The Pennsylvania Mental Act of 1951 is plain in its meaning. It is true that a State tribunal must be left free to exercise reasonable discretion in these matters, Nobles v. Georgia, 168 U. S. 398, but the record should show that there is no violation of humanitarian policy. Solesbee v. Balkom, *supra*. The inquiry into the petitioner's mental condition and the decision must be fair. The fact that the decision may have been reached in good conscience & born of good motives is no proof of its reliability as not offensive to due process. This Court has held that, though there may be no constitutional bar for a sentencing Judge, in the exercise of his discretion, to use even out of court information to guide him in imposing sentences,

it must be remembered that there always exists a possibility of abuse of that discretion. Williams v. N. Y., 337 U. S. 241, 69 S. Ct. 1079. And an abuse of discretion was found to have existed by this Court in Townsend v. Burke, 68 S. Ct. 1252. The question of "abuse of discretion" by a State tribunal was before this Court recently in Gyger v. Burke, 334 U. S. 728, 68 S. Ct. 1256. There the Court in a 5 to 4 decision sustained the exercise of discretion by a State Judge but added "*nothing in the record impeaches the fairness or temperateness with which the trial judge approached his task*" (emphasis supplied). Due process express a demand for civilized standards of law and imposes an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those cannons of decency and fairness of English speaking peoples. U. S. *ex rel.* Darcy v. Handy, 224 F. 2d 504; as applied to criminal law, denial of due process is failure to observe that fundamental fairness essential to the very concept of justice. Lisbena v. Peoples of State of California, 314 U. S. 219; 62 S. Ct. 280.

Did the trial Judge act reasonably and fairly, where as here, he sought advice in a highly specialized field of medicine, selected the advisers, forbade partisan evidence at the Commission's hearing, and then set aside a unanimous finding of "mental illness" as defined by Pennsylvania? The appointment of the Commission, says Pennsylvania, in Com. v. Iacobino, 319 Pa. 65, is to inform the conscience of the Court. But where there is an abuse of discretion, the Court will correct it. Com. v. Ragone, 317 Pa. 113. In the instant case, the Supreme Court of Pennsylvania found no abuse of discretion on the part of the trial Judge. Com. v. Moon, 383 Pa. 318. We submit that there was an arbitrary exercise of discretion. We further

submit the analogy contained in the dissent of Justice Musmanno in Com. v. Moon, 383 Pa. 319 is apropos. The Justice there said that the action of the trial Judge could be likened to a person calling in a physician to attend a ill person and after making a diagnosis of appendicitis, having that person call upon a janitor or layman to remove the appendix.

It is respectfully submitted that the action of the trial Judge was an abuse of judicial discretion and offends against due process. To escape from the mandatory legal consequences prescribed by the Mental Health Act, the trial Judge was obliged to take inconsistent and contradictory positions in the course of his several opinions. In the language of a member of this Court in Orloff v. Willoughby, 345 U. S. 83, 87-88; 73 S. Ct. 534, the Judge "changed positions as nimbly as if dancing a quadrille." And, of course, a predetermined decision would be a denial of due process. U. S. v. Shaughnessy, 347 U. S. 260, 267; 74 S. Ct. 499.

The Commonwealth may contend that this application is filed out of time, 28 U. S. C. 2101 (d) leaves the matter of timeliness to the discretion of the Court. There is no jurisdictional or statutory bar. We contend that the circumstances of this case should move the Court to waive the time limit prescribed in Rule 22 (1).

Due to the mental condition of the petitioner and his inability to cooperate with counsel, it was not possible to rationally communicate with him. For that reason, the petition was not filed within the required time. It is now filed because the District Court for the Western District of Pennsylvania, believing that no exceptional circumstances existed and following Darr v. Burford, 339 U. S.

258, 70 S. Ct. 587, ruled that petitioner had not exhausted his State remedy and dismissed a petition for a writ of habeas corpus. Moon now awaits execution on the week beginning November 18, 1957.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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EXHIBIT A

Appendix A

389 Pa. 364.

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IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 243 January Term, 1957.

COMMONWEALTH OF PENNSYLVANIA, v. NORMAN W. MOON. } Appeal from the Judgment of Sentence of Oyer and Terminer of Warren County at No. 1 February, 1954.

OPINION

ARNOLD, *J.* FILED: May 27, 1957

The defendant, Norman W. Moon, murdered the Honorable Allison D. Wade, President Judge of Warren County. At his trial before a jury he was convicted of murder in the first degree and the jury imposed the death penalty, and defendant appeals.

Moon was directed to appear before Judge Wade on a charge of failure to comply with an order of support. (See Commonwealth v. Moon, 174 Pa. Superior Ct. 334, 101 A. 2d 147.) The day before the date fixed for his appearance he cashed a check for $1,500 and purchased a forty-five calibre pistol, a box of shells and two clips, both of which were loaded when he entered the court room. Moon never paid anything on the support order entered against him. Having been ordered to appear before the Court of Quar-

ter Sessions of Warren County for sentence (he was then in default $1,500 on the support order), he appeared before said court on January 13, 1954. When asked if he intended to comply with the order of support, Moon replied, "Absolutely not." When he stood before the court he drew the pistol in question, which had been loaded with one clip, and emptied the gun in various directions and at Judge Wade. Judge Wade stumbled from the dais and was prone on the floor of the court room when Moon fired two more shots. Judge Wade cried out, "Don't shoot, please don't shoot, I won't sentence you," to which Moon replied, "You God-damned * * * you will never get a chance to."

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Judge Wade's death was almost instantaneous. Moon then reloaded his gun and while making his escape from the court room threatened to kill attorney Bonavita who attempted to stop him. Moon got into his automobile and soon after officers stopped progress of the automobile by shooting the tires. He then got out of the car and shot himself in the neck, and was taken to the Warren Hospital, where he recovered. Repeatedly during his trial the defendant stated that he was extremely mad or furious.

Subsequent to the verdict Moon presented a petition to appoint a commission to determine his mental condition. The court found him to be sane, but on appeal this finding was reversed and this Court ordered a reexamination of the commission's findings and recommendation, and reconsideration of the evidence in the light of the statutory definition of mental illness. See Commonwealth v. Moon, 383 Pa. 18, 117 A. 2d 96. Thereafter the lower court executed the mandate of this Court, and entered an order re-

fusing to commit him to a mental hospital and finding that it was not satisfied that he was mentally ill. On appeal this order was affirmed. See Commonwealth v. Moon, 386 Pa. 205, 125 A. 2d 594. Thereafter the court below heard the defendant's motion for new trial, denied the same, and this appeal followed.

The defendant, who took the stand on his own behalf, admitted all of the circumstances of the killing, but claimed the following errors:

(1) When examining on the *voir dire* the first juror drawn, counsel for appellant sought to ask the following hypothetical question: "Mrs. Knapp, again under the law of Pennsylvania, a person who at the time of the commission of any act which would otherwise be criminal, is unable to tell the difference between right and wrong and to appreciate the consequences of his acts, such a person is entitled to be found not guilty by reason of

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insanity. If you found from a fair preponderance of the evidence, that the accused at the time of the commission of this act, was unable to distinguish right from wrong and unable to appreciate the consequences of his act, would you then find him not guilty by reason of insanity?" The Commonwealth's objection was sustained and properly so. This Court declared in *Commonwealth v. Bentley*, 287 Pa. 539, *at page 546, 135 A. 310:* "In conducting the preliminary examination, considerable latitude must be permitted to elicit the necessary information, but it is to be strictly confined to inquiries disclosing qualifications, or lack of them, and not extended so as to include hypothetical questions, when their evident purpose is to have the jurors indicate in advance what their decisions will be under a

certain state of the evidence or upon a certain state of facts, and thus possibly commit them to definite ideas or views when the case shall be finally submitted to them for their decision."

(2) The appellant claims the court below committed error in not sustaining the challenge for cause as to several jurors following examination on *voir dire*. These challenges for cause were made at a time when the defendant's peremptory challenges were not exhausted, and hence the refusal of the challenge cannot be prejudicial error: *Sagers v. Commonwealth*, 88 Pa. 291, 306, 307; *Commonwealth v. Diablo*, 375 Pa. 257, 264, 100 A. 2d 45. The defendant is not entitled to the services of any particular juror but only as to twelve unprejudiced jurors.

(3) The defendant was not prejudiced by the action of the court in belatedly permitting the Commonwealth to challenge peremptorily one Honhart after he had been passed as a juror by the Commonwealth. The court, after excusing said juror, immediately, of its own motion, granted an additional peremptory challenge to the defendant. In *Commonwealth v. Schroeder*, 302 Pa. 1, 152 A. 835, the defendant was convicted of murder in the first degree and

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sentenced to death. The court there charged that certain evidence on credibility of one of the defendant's witnesses was substantive evidence of defendant's guilt. This Court commented, at page 11: "Apparently the court did inadvertently treat the evidence as substantive proof. *We are convinced that this instruction did defendant no harm and did not bring about her conviction.*" (Italics supplied.) Thus this Court there determined that even though the instruction was erroneous, if the court was convinced that

the defendant was not harmed thereby, the judgment and sentence would be affirmed. "'*The defendant in a homicide case has no standing in an appellate court to complain of an erroneous instruction unless the error contributed to the result reached by the jury*': Com. v. Winter, 289 Pa. 284 [137 A. 261]; Com. v. Divomte, 282 Pa. 504 [105 A. 821].": *Commonwealth v. Schrader, supra.* (Italics supplied.)

(4) The Commonwealth introduced the photograph of Judge Wade taken very shortly after the assault by the defendant. It was offered to show the location of the body in the court room and to show the direction of the bullet wounds in vital parts. Having examined the photograph carefully, we find that it was not inflammatory or prejudicial. It simply showed a body prone on the floor of the court room with stains, evidently blood, on its left side. Introduction of such exhibits is a purely discretionary matter for the trial judge, and we find no abuse of discretion: *Commonwealth v. Ballem*, 386 Pa. 20, 27, 123 A. 2d 728.

(5) The defendant next complains that he was not allowed to show the bias of the witness, Bernice R. Seavy. We have examined this assignment and find no merit in it. Evidently the appellant misunderstood the answer of the witness.

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(6) Next the defendant objects to the memorandum made by Commonwealth witness during an interview with the defendant while he was in the hospital. This memorandum was not signed or written by the defendant, nor is such necessary. The defendant was unable to speak due to his self-inflicted wounds and was instructed to nod his head yes or no, and to hold up fingers to indicate "how many." The memorandum was clearly admissible just as

an unsigned or oral statement of the defendant would have been. Its weight was for the jury, and the defendant was not harmed by the admission in evidence of the memorandum. The answers of the defendant to the questions asked were fully testified to by officers Nadueo and Mehallic.

(7) The defendant complains about the lower court's instructions on the question of the alleged insanity of the defendant. There was no prejudicial error in the court's charge on the question of insanity, although much is attempted to be made of the self-inflicted wounds of the defendant. See *Commonwealth v. Lewis*, 222 Pa. 302, 303, 71 A. 18; *Commonwealth v. Wireback*, 190 Pa. 138, 42 A. 542; *Commonwealth v. Barnes*, 199 Pa. 335, 49 A. 60. This was examined by the jury, which rejected the plea of sympathy based thereon. See also *Commonwealth v. Moon*, 383 Pa. 18, 117 A. 2d 96, and *Commonwealth v. Moon*, 386 Pa. 205, 125 A. 2d 594.

Here the defendant was actuated by hatred of his wife and quite evidently had made up his mind that he would not comply with the court order against him for her support. The day before the killing he had obtained sufficient money to pay the back support, but refused to pay it, and instead murdered the judge who was about to order him to do so. The defendant had a night's sleep after he had purchased the gun and shells and obtained the $1,500. As long as we are to have the death penalty in Pennsylvania certainly this is a clear case for its imposition.

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In accordance with the Act of February 15, 1870, P. L. 15, Section 2, 19 PS sec. 1187, we have reviewed both the law and the evidence in this record, and have determined that all the ingredients necessary to constitute murder in the first degree have been proved to exist.

The judgment is affirmed, and the record is remitted to the court below for the purpose of execution.

Mr. Justice Musmanno files a dissenting opinion.

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IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 243 January Term, 1957

COMMONWEALTH OF PENNSYLVANIA, v. NORMAN W. MOON. } Appeal from the Judgment of Sentence of Oyer and Terminer of Warren County at No. 1 February, 1954.

DISSENTING OPINION

MUSMANNO, *J.* FILED: May 27, 1957

The Majority Opinion in this case says: "As long as we are to have the death penalty in Pennsylvania certainly this is a clear case for its imposition." It is indeed difficult to imagine a more flagrant violation of law and order than the assassination of a judge sitting in Court—providing, of course, the killer is sane. If the heinousness of the act is to dictate the punishment, regardless of sanity or insanity, then Norman W. Moon should be executed. But, as long as we have in Pennsylvania the rule that an insane person should not be executed, certainly this is the case to apply it. I would think that the very act of shooting a judge suggests insanity at the outset. The Majority thinks otherwise.

In addition, however, to the outer aspects of the case, we have the findings of a Sanity Commission, duly appointed by the Court, which unanimously found:

"a. Norman W. Moon is in fact mentally ill.
b. Norman W. Moon's mental illness is that of dementia praecox of the paranoid type.
c. This illness is chronic and continuing.
d. Norman W. Moon is a proper subject for commitment to a mental hospital."

The lower Court which appointed the commission, after lauding the abilities and integrity of its members, declined to follow its recommendations. This Court, on appeal, affirmed the declination. (386 Pa. 206.) I dissented from this Court's decision and I still believe that, in accordance with the Commission's

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recommendations, the defendant should be committed to a mental hospital until such time as he will have regained sanity, when the matter of the verdict against him in the trial for murder may be disposed of in accordance with law and justice.

The defendant's counsel complains of various trial errors. Without expressing my views on all the reasons advanced for a new trial, I wish to indicate my agreement with counsel's complaint that the prosecuting attorney improperly introduced in evidence a photograph of the body of Judge Wade, as it lay on the courtroom floor after the shooting. I believe that defense counsel is justified in complaining, as he does in his brief:

"The prosecuting attorney advanced two reasons in support of the offer: (1) to show the location of the body in the court room; and (2) to show the location of the bullet wounds in vital parts causing death.

"Obviously the exhibit had no probative value and was not admissible under the first ground advanced. The testimony shows that the photograph does not depict the position or location of the body at the time of his death. The body had been moved, and the clothing had also been arranged so as to display prominently the gruesome spectacle of blood stains . . .

"With respect to the second reason advanced in support of the offer, it is obvious that Exhibit 4 was merely cumulative. It was not necessary to offer the photograph in order to prove the *corpus delicti* or cause of death.

"Before the photograph was offered, the Coroner had testified with respect to this point:

> 'Q. What was the cause of death?
> A. Two wounds on the left side between about at the elbow (Witness indicating on his own body) made by bullets.'

"This testimony was subsequently elaborated and the witness illustrated his testimony adequately by indicating the location of the bullet marks on his own body . . .

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"Thus the real purpose of offering the photograph was manifestly to shock and horrify the jury. For this purpose, as the trial Court concedes and as the decisions of this Court have often emphasized, the exhibit should not have been admitted. It should have been excluded as inflammatory and undoubtedly prejudicial to defendant."

EXHIBIT B

Appendix B

386 Pa. 206.

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IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT.

No. 250 January Term, 1956.

COMMONWEALTH OF PENNSYLVANIA, v. NORMAN W. MOON, *Appellant.* } Appeal from Order of the Court of Oyer and Terminer of Warren County at No. 1 February Sessions, 1954.

OPINION OF THE COURT.

FILED: October 3, 1956

CHIDSEY, *J.*

On January 13, 1954 the appellant Norman W. Moon appearing before the Court of Quarter Sessions of Warren County on a charge of failure to comply with a support order, shot and fatally wounded the Honorable Allison D. Wade, President Judge of the 37th Judicial District. Following his apprehension appellant was indicted, tried and on May 25, 1954 convicted of murder in the first degree. The jury rejected his sole defense of insanity and fixed the penalty at death. About two months thereafter, on July 31, 1954, while appellant was confined in the Warren County Jail pending disposition of his motion for new trial, the county sheriff as keeper of the jail petitioned the court for the appointment of a commission under The Mental Health Act of June 12, 1951, P. L. 533, as amended, 50

PS sections 1071-1622. Without holding a hearing on the petition, the court on July 31, 1954, appointed a commission composed of two physicians and an attorney to investigate appellant's mental condition. After examining the defendant and holding hearings at which testimony and statements were taken, the commission on October 13, 1954 filed its report with the court in which it found that Moon was mentally ill, the illness being diagnosed as dementia praecox of the paranoid type, an illness chronic and

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continuing, and that he was a proper subject for commitment to a mental hospital. The commission also found that with the exception of two periods of acute mental disturbance, one at the time of his commitment and the other after the commission first met, both of which disturbances promptly subsided, appellant "* * * knew why he was in jail * * *, knew that he faced a sentence in accordance with the jury verdict * * *, knows that he is on trial for his life * * *, recalls his trial * * *, admits that no one is justified in taking anyone else's life * * *, knows that it is not right to shoot anybody * * *, and what the consequences of his acts might be * * *". The court after reviewing the report of the commission and the evidence on which it was based, was not satisfied that the defendant was a proper subject for commitment and directed that the proceedings in his case should continue. In arriving at this conclusion the court applied the law as it existed prior to the enactment of The Mental Health Act of 1951. The defendant appealed to this Court and in a decision handed down October 5, 1955, see 383 Pa. 18, 117 A. 2d 96, we held that The Mental Health Act of 1951 had changed the test to be used in staying criminal proceedings and

that the test prescribed by it was whether the defendant had a mental illness which so lessened his capacity to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. We therefore remanded the record and directed the court to reexamine the commission's findings and recommendation and to reconsider the evidence "together with any additional relevant evidence" in the light of the statutory definition of mental illness.

Thereafter counsel for the Commonwealth requested the court to fix a hearing to receive additional relevant evidence as to the defendant's conduct between the time of his examination by the commission and the filing of the opinion of this Court, a

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period of approximately fifteen months. The court notified the defendant's counsel of the Commonwealth's request for hearing and the nature of the testimony it proposed to produce and suggested that a date for hearing be agreed upon far enough in the future to afford counsel for the defendant opportunity to determine and prepare any evidence which he might desire to produce at such hearing. Counsel for the defendant and the Commonwealth agreed on December 12, 1955 as the date for hearing. At this hearing seven employes of the Western State Penitentiary to which defendant had been removed in April, 1955 testified, namely, the warden, the prison doctor, the three guards who had been continuously in charge of the defendant in eight-hour shifts, a guard who supervised visits from members of the defendant's family, and the guard who read all letters written by the defendant in his capacity as mail censor. At the completion of their

testimony defendant's counsel advised the court that he had no testimony to offer. The prison doctor testified that he made a physical examination of the defendant upon his admission and thereafter saw him at least once a week; that defendant was well nourished and physically active; that aside from an affliction in the middle ear which caused a ringing in the ears, and a few stomach upsets which were easily controlled, the defendant was physically well; that he observed the defendant at times reading in his cell and at times in the exercise yard playing games with other prisoners. The warden testified that the defendant participated in the exercise periods, both morning and evening; that he obtained books and magazines from the library, corresponded with his family and friends, and purchased items from the prison commissary; that he was visited once a month by various members of his family, and once each day by someone from the medical department as were all others confined in the isolation block; that the defendant had requested and received visits from the prison chaplain. The three guards who were in charge of the defendant at all times except some Saturdays and

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Sundays, testified to numerous contacts and conversations with the defendant and observed him continuously for almost eight months; that his conversation and all his actions were normal and that they noted no unusual or abnormal conduct; that he regularly drew from the prison library at least three books a week, sometimes six; that he subscribed to two magazines, "The Argosy" and "Hunting and Fishing"; that he also had access to and read other magazines such as "Life" and "Time"; that he shaved regularly; that he didn't smoke. One of the guards, Lieutenant King, testified that he supervised visits which defendant received from his mother and brother;

that there were no restrictions on defendant's visiting privileges and the visits lasted about a half hour under his constant supervision. William E. Holmes, who was mail censor of the prison, testified that he read all letters written by the defendant which were about sixty in number; that he wrote to his father, mother, brothers and an aunt, and to a former employer; that nothing unusual was noted in any of the letters and that no items were included which had to be stricken out. This witness testified that he noticed nothing in connection with the letters which might indicate a lack of self-control or judgment or discretion, and all of the witnesses similarly testified with respect to the defendant's conduct generally, which was normal throughout. No complaint of misconduct on the part of the defendant was ever made. All of the witnesses had been associated with the Western State Penitentiary for periods ranging from five to thirty-two years.

Thereafter the court filed an opinion and the following order: "And now, January 28, 1956 the Court having reexamined the findings and recommendation of the Sanity Commission appointed in this case, and having reconsidered the evidence together with additional relevant evidence, as directed by the Supreme Court of Pennsylvania, and for the reasons set forth in the foregoing

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Opinion, and upon consideration of the entire record in the case, and the Court not being satisfied that the defendant is mentally ill as defined in the Mental Health Act of 1951 and the standards set by the Supreme Court in this case, it is hereby Ordered that proceedings in this case shall continue and any additional reasons for a new trial shall be filed forthwith." Exceptions thereto were

dismissed after argument and a final order entered on March 29, 1956 affirming the earlier order. This appeal followed.

In construing The Mental Health Act of 1951 we stated in our disposition of the prior appeal (383 Pa. at p. 28): "* * * the controlling factor is the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnose a mental illness. * * *", and that the determinative issue is whether the illness so lessened the defendant's capacity to use his customary self-control, judgment and discretion as to render it necessary or advisable for him to be under care. This we held to be the standard which the Legislature promulgated to guide the commission and the court. The commission found the defendant had a mental illness and was a proper subject for commitment to a mental hospital. It does not appear that the commission applied the standard prescribed by the Legislature, but as we said in the earlier appeal at p. 29: "Assuming the commission found appellant a proper subject for commitment under this standard, its findings while persuasive were nevertheless advisory only and not mandatory upon the court, for under Section 345(d) of the Act it is the court and not the commission which must be satisfied that appellant is mentally ill under the standard prescribed. It follows that the court in the instant case could have rejected, although not arbitrarily or capriciously, the commission's findings and conclusions and could have independently determined from the evidence that appellant's capacity to use his customary self-control, judgment and discretion had not been so lessened that it was necessary or advisable for him to be under care * * *".

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The appellant argues that the testimony of the witnesses connected with the Western State Penitentiary should not have been admitted. This argument is part and parcel of the major contention made at oral argument and in the brief of appellant's counsel that the defendant's conduct throughout as it bore on the exercise of his self-control, judgment and discretion, was a matter solely for interpretive determination by medical experts—a medical issue which the commission, two of the three members of which were qualified medical experts, conclusively decided. This contention flies in the face of all of our decisions. We have repeatedly and invariably held not only that testimony of laymen as well as experts is admissible in determining the mental status of a criminal defendant but that all of such testimony is for the consideration of the legal tribunal, be it court or jury, which has the ultimate determination of the issue: *Commonwealth v. Bance*, 381 Pa. 293, 113 A. 2d 290; *Commonwealth v. Patskin, supra*; *Commonwealth v. Carluccetti*, 369 Pa. 190, 85 A. 2d 391; *Commonwealth v. Cavalier*, 284 Pa. 311, 131 A. 229; *Commonwealth v. Gearhardt*, 205 Pa. 387, 54 A. 1029; *Commonwealth v. Wireback*, 190 Pa. 138, 42 A. 542. As stated in *Commonwealth v. Carluccetti, supra*, quoting from *Commonwealth v. Cilione*, 293 Pa. 208, 142 A. 216: "* * * * * * * You do not have to be a psychiatrist to judge whether a man's actions are normal or abnormal * * * * *".

Under The Mental Health Act of 1951, as under the prior Act of July 11, 1923, P. L. 998, it is expressly provided that the court, not the commission, must be satisfied that the defendant's mental condition is such as to require his commitment to a mental hospital. The report of the commission is advisory only: *Commonwealth v. Patskin*,

supra; Commonwealth v. Ballem, ____ Pa. ____, ____ A. 2d ____. As was stated in *Commonwealth v. Bechtel*, 384 Pa. 184 at p. 190, 120 A. 2d 295: "Inquiries into the mental health or sanity of a prisoner whether made before trial or after

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conviction and before sentence are 'to inform the conscience of the judge'.": *Commonwealth v. Iacobino*, 319 Pa. 65, 178 A. 823; *Commonwealth v. Scovern*, 292 Pa. 26, 140 A. 611. In the instant case the court observed the defendant throughout his trial which lasted two weeks and at which he testified at length, examined and considered the evidence adduced before the commission which included testimony by the defendant and by medical experts, the commission's findings and report, heard the testimony of witnesses during defendant's incarceration at the Western State Penitentiary and determined that the defendant had suffered no lessening of his capacity to use his customary self-control, judgment and discretion.[1] We have thoroughly reviewed the record and are convinced that the court did not abuse its discretion in reaching such conclusion.

The appellant also contends that the court erred in excluding certain evidence. As to this the record nowhere discloses that any request was made of the court to hear witnesses on defendant's behalf. At the completion of the testimony of the witnesses from the Western State Penitentiary at the hearing on December 12, 1955, counsel for de-

[1] In referring to the two occasions reported by the commission of acute mental disturbance which "promptly subsided", the court in its opinion states: "These two brief instances, which were in part at least stimulated by the stress of his confinement, of which there is no evidence of any reoccurrence in the record, can hardly be taken as indicative of any general lessening in defendant's capacity to use his customary self control, judgment and discretion. A repetition of such episodes could have been readily observed by anyone having close supervision of the defendant, with or without medical training, and the testimony of the prison guards who were in charge of the defendant and have had him under close supervision at all times shows no repetition of such episodes since August of 1954".

fendant expressly stated that "The defendant has no testimony to offer, if the Court please." As before stated, the court advised defendant's counsel that the date of hearing for taking additional testimony would be fixed far

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enough in the future to afford opportunity for counsel to prepare any evidence which they might desire to produce at the hearing.[2] Therefore it is surprising to find in the exceptions filed to the court's ruling of January 28, 1956 complaint that defendant should have been afforded but was denied an opportunity to submit additional evidence from medical experts. These exceptions could have been dismissed summarily. Assuming, however, that such a request was informally made, possibly during oral argument on the exceptions inasmuch as the court in its opin-

[2] During the hearings before the commission, counsel for the defendant requested permission to present medical testimony before the commission "to insure examination by trained psychiatric personnel not employed by the Commonwealth of Pennsylvania." The Deputy Attorney General expressed the opinion that the request "goes to the proof of the competency and prejudice of the present commission and as such should be addressed to the court and not the commission." Defendant's counsel then stated it was not challenging the competency of the commission but requesting that testimony be received by a psychiatrist or psychiatrists not affiliated in any way with the Commonwealth "in any employer-employee relationship." The commission stated it would consider the request. The commission found the defendant a proper subject for commitment and apparently decided it did not require additional medical testimony to arrive at its conclusion. Counsel made no application to the court for the taking of additional testimony either before or after the commission filed its report. After consideration of the report and the record of the proceedings and testimony before the Commission, the court filed an opinion and order dated October 21, 1954, refusing commitment and directing that the criminal proceedings continue. In the course of its opinion the court referred to and approved the judgment of the commission in not calling additional medical witnesses. If defendant's counsel felt that the commission's conclusion should have been buttressed by additional medical testimony, they could have filed an appropriate exception. However they filed only a general exception which after argument thereon was dismissed by the court below in an extensive opinion and order filed February 9, 1955 to which again only a general exception was filed, and on the first appeal to this Court made no complaint regarding the action of the Commission in not receiving additional medical testimony. At no time did counsel for the defendant make any request whatsoever to the Court to present additional medical testimony on defendant's behalf but, contrariwise, after we remanded the case for reconsideration, the court below, as stated in the text of this opinion, went out of its way to afford opportunity for the introduction of additional testimony on defendant's behalf.

ion indulgently considered the matter, the hearing of additional testimony was discretionary with the court as indeed is the appointment of a commission in the first instance (*Commonwealth v. Gossard*, 385 Pa. 312, 123 A. 2d 258, and cases cited therein) and we find no abuse of discretion. If the court were required to reopen the proceedings for the introduction of additional testimony by medical experts on defendant's behalf, by like token it would be obliged to hear additional testimony by medical experts offered by the Commonwealth in rebuttal. In fact there would be little power in the court to end the inquiry which could be indefinitely prolonged by the persistence and resourcefulness of counsel. The rights of the

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defendant as an offender on trial for an offense are not here involved. The inquiry is not an adversary proceeding to determine the guilt or innocence of the defendant but a collateral proceeding entirely apart therefrom to inform the conscience of the court as to the appellant's mental condition—not merely whether defendant had a mental illness or disorder in the opinion of psychiatrists or medical witnesses but, assuming that some mental illness existed, whether it so lessened his capacity to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. This was for the evaluation of the court and the extent of the inquiry was within its discretion. It cannot be said that the wide scope of the court's inquiry, above outlined, which included consideration of the opinions of several impartial qualified medical experts, was insufficient to inform the conscience of the court as to the defendant's mental status under the test or standard prescribed by The Mental Health Act

We are fully satisfied that the court did not commit any error of law or abuse its discretion in refusing to commit defendant to a mental hospital and in directing that the proceedings in the criminal action continue.

Order affirmed.

Mr. Justice Bell files a concurring opinion.

Mr. Justice Musmanno files a dissenting opinion.

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IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 250 January Term, 1956

COMMONWEALTH OF PENNSYLVANIA,
v.
NORMAN W. MOON,
Appellant.

Appeal from Order of the Court of Oyer and Terminer of Warren County at No. 1 February Sessions, 1954.

CONCURRING OPINION

BELL, *J.* FILED: OCTOBER 3, 1956

This appeal taken before sentence and judgment and while defendant's motion for new trial has not been disposed of, is clearly interlocutory and should be quashed. If this defendant is committed before his motion for a new trial is disposed of, it may be many years before he appears in Court for a redetermination of his sanity or mental condition, or for the disposition of his motion for a new trial, or for a new trial if a new trial is granted. The net result of such delay may well be the obstruction or de-

feat of justice because of the death, resignation or retirement of the trial Judge or stenographer, or because of the absence or death or dimming recollections of witnesses. Dilatory or delaying tactics are well known devices employed by criminals to defeat justice and such tactics or motions should be rejected by the Courts whenever reasonably possible.

If an appeal is taken after defendant's motion for a new trial has been dismissed and judgment of sentence has been entered on the verdict, defendant can then raise all questions he desires, including the lower Court's refusal to commit him to an institution. This has always been the salutary policy in Pennsylvania. The general rule is long and well established that a defendant has no standing to appeal, even after conviction, where no sentence or other final judgment has been entered against him: *Commonwealth v. Hall*, 173 Pa. Superior Ct. 285, 98 A. 2d 386; *Commonwealth v. Hicks*,

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173 Pa. Superior Ct. 395, 98 A. 2d 478; *Commonwealth v. Trafley*, 170 Pa. Superior Ct. 200, 85 A. 2d 622; *Commonwealth v. Graham*, 170 Pa. Superior Ct. 343, 85 A. 2d 632; *Commonwealth v. Feldman*, 159 Pa. Superior Ct. 3, 46 A. 2d 332; *Commonwealth ex rel. Holly v. Ashe*, 368 Pa. 211, 82 A. 2d 244; See also, Act of March 31, 1860, P. L. 427, section 57.

In *Commonwealth ex rel. Holly v. Ashe*, 368 Pa., *supra*, the Court said (page 218): "'appeals may not be taken in criminal proceedings where judgment of sentence has not been passed.'"

In *Sullivan v. Philadelphia*, 378 Pa. 648, 107 A. 2d 854, the Court said: "Even with the consent of all interested

parties, appellate jurisdiction of an interlocutory order or decree may not be assumed: Stadler v. Mt. Oliver Borough [373 Pa. 316, 95 A. 2d 776]. The evident policy of the law in such regard is to preclude piecemeal determinations and the consequent protraction of litigation."

There are no extraordinary circumstances, no jeopardy of basic human rights, to justify taking the present case out of the aforesaid general rule.

Since the decision in Commonwealth v. Moon, 383 Pa. 18, 117 A. 2d 96, this Court decided the case of Commonwealth v. Novak, 384 Pa. 237, 120 A. 2d 543, which I believe was inadvertently overlooked by the majority. In the Novak case this Court decided that an Order of the lower Court dismissing the petition of a defendant to commit him to a mental hospital—which petition was filed after indictment but *before trial*—was interlocutory and not appealable. The Novak case, in my judgment, in principle rules the instant case since there is no difference in principle between the dismissal of a commitment petition presented before trial and one presented during trial or after trial but before sentence.

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To allow this interlocutory and unnecessary appeal will establish a precedent—a bad precedent—for an almost endless series of commitment petitions followed by interlocutory appeals by defendants (1) during trial, and (2) after trial but before sentence. These delaying tactics will hamper and for the aforesaid reasons will often defeat justice.

If the appeal is not quashed, I would concur in Justice Cunsey's able opinion.

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IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 250, January Term 1956

COMMONWEALTH OF PENNSYLVANIA, v. NORMAN W. MOON, *Appellant.*	Appeal from Order of the Court of Oyer and Terminer of Warren County at No. 1 February Sessions, 1954.

DISSENTING OPINION

MUSMANNO, *J.* FILED: OCTOBER 3, 1956

On January 13, 1954, Norman W. Moon was called to the bar of the court in the Court of Quarter Sessions of Warren County to explain why he had failed to pay $30 a week to his wife, as ordered, which order had been affirmed by the Superior Court of Pennsylvania. As he approached the bench he whipped from beneath his belt a 45 Colt pistol and opened fire on Judge Allison D. Wade who was presiding. He also turned his blazing weapon on the District Attorney, who, however, was able to escape from the room unharmed. A bullet whizzed by Mrs. Bernice Seavy, the Court reporter, as the Judge, mortally wounded, collapsed to the floor, moaning: "He shot me, he shot me." Moon fled from the courtroom, leaped into a car and sped away, followed by State Police who had been summoned by the District Attorney from a telephone. After a chase of some 10 miles, the police succeeded in puncturing a tire of Moon's car which came to a stop, and as the police

closed in on the fugitive he shot himself in the throat. When he recovered from this wound, he was tried for the murder of Judge Wade who had died within a few minutes after two bullets had penetrated his chest. Moon was found guilty of murder in the first degree and the jury fixed the penalty at death.

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On July 1, 1954, the Court of Oyer and Terminer of Warren County appointed a Sanity Commission, under the provisions of the Mental Health Act of June 12, 1951, to inquire into Moon's mental state. The Commission, composed of two physicians and an attorney, unanimously concluded, and so reported to the Court that:

"a. Norman W. Moon is in fact mentally ill.
b. Norman W. Moon's mental illness is that of dementia praecox of the paranoid type.
c. This illness is chronic and continuing.
d. Norman W. Moon is a proper subject for commitment to a mental hospital."

The Warren County Court declined to follow the recommendation of the Sanity Commission and the defendant appealed to this Court. We sent the record back with instructions for a re-evaluation of the Sanity Commission's report, plus the taking of any additional testimony the lower Court deemed in order. The Warren County Court took further testimony, reappraised the Commission's report and again refused to commit Moon to a mental institution. The case is now before us for the second time.

The majority of this Court is of the opinion that the lower Court was justified in its conclusion. I am of a contrary view. Although the lower Court refuses to hospitalize the defendant Moon, it admits that the Sanity Commission was "well justified" in finding that the defendant

was "afflicted with dementia praecox of the paranoid type."

Mental illness is defined in Section 702 of the Act of 1951, 50 PS 1072, as follows:

> "(11) 'Mental illness' shall mean an illness which so lessens the capacity of a person to use his customary self control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include 'insanity', 'unsoundness of mind', 'lunacy', 'mental disease', 'mental disorder', and all other types of mental cases, but the term shall not include 'mental deficiency,' 'epilepsy', 'inebriety', or 'senility', unless mental illness is superimposed."

The Court below has said that while the question as to whether or not the defendant's capacity to exercise his customary self control, judgment and discretion in the conduct of his affairs was lessened by mental disorder is largely a medical question, it is

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a question that can be intelligently answered not only by psychiatrists and doctors but by laymen who observed the conduct of the subject. Further, that the lay witnesses in this case, notably the prison guards who had seen the defendant in prison, convinced the Court that Moon's capacity for customary self control the discretion had not been lessened enough to require his hospitalization.

The Court's reasoning in this respect is an enigma. It calls in experts to solve a problem and then discards their conclusions for the opinions of passersby. Speaking of the chairman of the Sanity Commission, the lower Court said:

> "The Court has full faith in the competence of Dr. Israel. His qualifications (Sanity Commission record page 3) include membership on the Warren State Hos-

pital staff for twenty eight years, Superintendent for nineteen years, Fellow of the American Psychiatric Association for more than twenty years, Member of the Pittsburgh Neuro-Psychiatric Association, the Pennsylvania Neuro-Psychiatric Association, the Pennsylvania Medical Association, Warren County Medical Association, and President of the Pennsylvania Neuro-Psychiatric Association. The Court also has faith in his integrity and is fully confident that he performed his duties as a member of the Commission objectively and fairly. He is incapable of being influenced by prejudice. The Court has been personally acquainted with Dr. Israel for twenty years."

The Court went on in its Opinion:

"The Court has equal faith in the integrity of the other two members of the Sanity Commission and in their qualifications and ability to fulfill their duties as members of the Commission. The qualifications of Dr. William S. Walters (Sanity Commission Record page 3) show him to be a graduate of the University of Pennsylvania Medical School, licensed to practice in Pennsylvania, and engaged in the general practice of medicine in Warren, Pennsylvania, since 1947; a member of the American Medical Association, the Pennsylvania State Medical Association and the Warren County Medical Association. The Court believes Dr. Walters to be particularly well qualified for examination and report on the condition of the defendant because Dr. Walters 'attended Norman Moon as a medical man from the start.' He 'was assisting Dr. Vashman (surgeon) at the table when he (defendant)

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first came in on January 13th and treated him during his stay in the Warren General Hospital.' After defendant was transferred from the Warren General Hospital to the Warren County Jail on January 29, 1954 (Sanity Commission Record page 7) Dr. Walters saw him 'perhaps weekly for about a month, and then the visits tapered off to anywhere between one and three weeks except upon the call of the jail to come over and administer in minor problems that came up about his diet, bowels, sedation, many things.' (Sanity

Commission Record, page 46). Dr. Walters also examined him when he caused trouble on two occasions as a prisoner in the Warren County Jail. Sanity Commission Record pages 46, 47 and 48). The third member of the Commission, R. Pierson Eaton, Esq., has been personally known to the Court for twenty years. He was admitted to practice before the Supreme Court of Pennsylvania and the courts of the 37th Judicial District in 1927 and since that time has been engaged in the active practice of the law in Warren, Pennsylvania. He is a member of the Federal Bar and of the Pennsylvania and Warren County Bar Associations. The Court is well satisfied with the qualifications of the members of the Sanity Commission, and with the investigation made by them."

It is difficult to conjure up a more qualified board of inquiry than the one which has received so glowing an accolade from the Court which appointed it. But this accolade has been torn from the brow of the Commission and cast into discard while the Court which conferred it takes up the recommendation of prison guards. The action of the Court can be compared to the president of an airline company hiring highly specialized aeronautical mechanics to examine a grounded plane to determine what, if anything, is wrong with it, and then calling upon bystanders to decide whether it should take to the air. It is like having a doctor examine a patient to determine whether he has appendicitis and then asking the janitor to decide if the appendix should be removed.

The Warren County Court said that the—

"Defendant's symptoms as found by the Commission, indicate by their nature that the diagnosis was purely medical and that when the Commission found the defendant to be 'mentally ill' it was using the term mentally ill in a purely medical sense and not in the light of the definition of 'mental illness' as contained in the Act."

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But the mental illness defined in the Act is exactly the mental illness which the Commission found. The Commission found that the defendant was suffering from dementia praecox of the paranoid type, that this illness was "chronic and continuing," and that the patient should be committed to a mental hospital. A person who should be committed to a mental hospital has certainly lost, in the words of the Act, the capacity "to use his customary self control, judgment and discretion in the conduct of his affairs and social relations."

The lower Court does not attack the findings of the Commission. In fact, as already pointed out, it says that the Commission was well justified as a medical matter in reaching its conclusion and added sententiously that "no doctor worthy of the name could make such a diagnosis without recommending treatment." The two doctors on the Commission were not only worthy of the name; they were worthy of the highest commendation, which the Court did not hesitate to bestow on them.

The Court of Oyer and Terminer of Warren County has extended the Periphery of its powers under the Mental Health Act, and this Court has done nothing to shrink that unwarranted assumption of enlarged jurisdiction. The Act says that:

> "If the Court is satisfied that the person sought to be committed is mentally ill * * * it shall order the commitment or transfer of such person to a mental hospital * * ***" (50 P. S. 1225.)

It is not the Court's province or duty to make a finding in the matter. It is not called upon to conduct a medical examination to gather facts, interview people, study diagnoses, and project prognoses. It has approbatory and disapprobatory powers, but those powers are not to be exer-

cised arbitrarily. It does have the conscientious obligation to be satisfied that what the Commission recommends is proper and just, but in reaching that satisfaction it may not indulge in caprice or over-fastidiousness.

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It cannot accept with full faith the conclusions of the Board it has appointed and then reject its recommendations without assigning a better reason than the one it has so far presented.

The Court apparently used an apothecary's scale in weighing the value of the medical findings, but piled high on an avoirdupois scale the opinions of non-medical witnesses. But if it intended to be influenced to such a considerable degree by the opinions, observations, and surmises of lay and non-technical persons such as prison guards, then it should have considered the entire lay picture of the storm in which Norman W. Moon, like the deranged King Lear, was the central figure. That picture reveals Moon as a mad man, as one possessing a mind as capable of being upset by the slightest winds of mischance and misfortune as a frail craft at the mercy of a typhoon.

No one but a person entirely bereft of the rudder of reason could have committed the horrible deed of which Moon was the executant. No reason, no rationale exercisable by even the lowest animal life, could justify his destruction of Judge Allison D. Wade. If Norman Moon is to be executed for the killing of Judge Wade, then a thousand executions would not be enough to expiate the monstrous assassination of so good a man, so excellent a judge, so kind and gentle a Christian. We who live in Allegheny County got to know Judge Wade very well through the years because he often came to our courts as a visiting judge. Here he won without effort the warm admiration of the lawyers, the full respect of the court

attaches, the confidence and trust of all litigants who came before him, and the affectionate regard of the judges. He was a gentleman and a jurist who could have been the central character of a book portraying the virtues, the graces, the kindness, understanding, philosophy, and amiable cheer of the "good old country judge."

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Judge Wade could not have been unaware of his munificent spirit, for he was ever ready and eager to add another act of goodness to the countless he had performed throughout his life of unceasing benevolence. The most shocking sensation which must have struck him as the cruel bullets felled him was surprise that anyone should want to do him harm. Thus, he cried out in hurt astonishment: "He shot me. He shot me."

I repeat that if Moon is to expiate his brutal deed, regardless of mental irresponsibility, it is a useless expenditure of time to have sanity commissions and judges pass upon his condition, but if we are to be true to the standards of the law and be guided by justice and not emotional prejudices, it is impossible to look upon Norman W. Moon as anything but a mentally ill person. His violent aggression had no rhyme, reason, purpose or objective. If he rationalized his act as one of justifiable revenge, he irrationally endeavored to deprive himself of the only satisfaction which could be experienced from the gratification of such a base passion, since he tried, immediately after the act of supposed revenge, to kill himself. One who plans an atrocious deed of revenge, plans also to enjoy the sadism of revelling in the knowledge that the object of his hatred is dead or suffering some mortal agony. But Moon was apparently as willing that he should die himself as that Judge Wade and the others he shot at should die.

Moon had no quarrel with the Court Reporter, Mrs. Bernice Seavy, but he tried to kill her also. He had no particular grudge against the District Attorney but he aimed fiery bullets at him. As a matter of fact, he had no special animosity against Judge Wade because it was only chance which brought the Warren County jurist before Moon's blazing pistol first. Moon had apparently set out to kill other judges too.

When the Superior Court affirmed the Warren County order of support against Moon, he proceeded to the office of the Prothonotary of the Superior and Supreme Courts in the City-County Building, Pittsburgh, and asked for the names of the judges of those tribunals. He learned that two of the appellate court judges had chambers close to the Prothonotary's Office. He set out at once

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for the Chambers of the writer of this Opinion, only two or three doors removed from the Prothonotary's Office. He failed to see the present writer, whose door was open to all visitors, only because on that day he was in Philadelphia.

Moon then proceeded to the chambers of Judge Gunther who fortunately also was absent. Although Judge Gunther had sat on the Superior Court which had heard Moon's case, the present writer had not had any association whatsoever with the Moon case. But it would appear that at that moment all judges were fair game for Moon's weapons of blind, maniacal hatred against all officialdom in the law.

Before the tragic encounter in Warren, Moon had travelled to Connellsville, stopped in Pittsburgh, drove back to Warren, and had generally thrashed about in a frenzy of geographical gyrating as erratic as were his furious and frantic actions in Judge Wade's courtroom.

If facts spell out intentions, or lack of them, and if circumstances are more convincing than words, it is clear that on January 13, 1954, and apparently for some time prior to that date, Moon was a man amuck. The doctors who examined him at length, the experts who studied his history, the scientists who probed into his attitudes, moods, and characteristics, came to the conclusion that the hinges on the door of Moon's intellect were shattered and that only medical care and treatment in a mental hospital might repair, if not wholly refashion, the delicate swivels on which one's whole life turns. The lower Court ignored these authoritative findings, preferring to be guided by the ideas, estimates, and free-and-easy views, no matter how honestly expressed, of prisons guards who were necessarily limited in their appraisement of the subject of whom they spoke. The lower Court, with every conscientious desire to do justice, would have considerable

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difficulty in overlooking the horrible reality that a brother judge had been shot down in the very temple of the law.

But it is strange that this Court, having before it the authoritative, documented and evidence-supported report of the Sanity Commission, should regard it as of less significance than the testimony of members of the prison staff who testified that the defendant wrote letters, read books, received visitors, and seemed calm in his surroundings. It might not be amiss to say in this respect that even a Bengal tiger must at times rest in the shade of a jungle tree. Even the fiercest storm abates its fury at intervals, only later to rise to more violent demonstration of uncontained wrath. But what of the homicidal convolutions in the tiger's brain? What of the deviative grooves in Moon's brain? What of the broken electric wire which at

any moment may swing into the path of innocent pedestrians and electrocute them on the spot?

The brain specialists in this case are more qualified to anticipate what a victim of dementia praecox may do than untrained lookers-on who merely observe the outer manifestations of a man caged within the confines of a stone-and-iron prison.

There is another reason why the Warren County Court's decision should be reversed, a reason, incidentally, which the Majority of this Court has treated rather cavalierly. The Majority Opinion makes the statement:

> "It is surprising to find in the exceptions filed to the court's ruling of January 28, 1956 complaint that defendant should have been afforded but was denied an opportunity to submit additional evidence from medical experts. These exceptions could have been dismissed summarily. Assuming, however, that such a request was informally made, etc."

There does not need to be an assumption in the matter. On August 5, 1954, Attorney Braemer, representing the defendant, made the following request to the Sanity Commission:

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> "By Mr. Braemer: At the time I also would like to request permission to present before the Commission testimony, expert medical testimony, regarding the condition of Norman W. Moon since the date of conviction. To clarify this request, we would like the opportunity of having Norman W. Moon examined by competent psychiatric personnel and offer the testimony of such psychiatrist before the Commission."

Attorney Lawley objected on behalf of the Commonwealth and suggested that the Commission confer with the Court on the matter. Attorney Eaton, Chairman of the Commission said: "That request will be considered by the

Commission and a report made to the Court." Mr. Lawley said that the request "goes to the proof of the competency and prejudice of the present Commission and as such should be addressed to the Court and not the Commission."

The record of this colloquy went to the Court, and, after considering it, the Court said on October 21, 1954:

> "Defendant's counsel requested the Commission for leave to have the defendant examined by another psychiatrist, not employed by the Commonwealth, and to have his testimony as to defendant's mental condition heard. This request was refused by the Commission. The Court has faith in the Commission and believes that if the Commission had concluded additional psychiatric testimony was required to enable it to make a full, complete and comprehensive report, it would have arranged for and heard such additional testimony. The Commission did not feel such was required, and the Court, on consideration of the record of the testimony taken before the Commission and its report, is satisfied of the judgment of the Commission on this point."

The Warren County Court thus took full responsibility for denying the defendant an opportunity to present independent expert medical testimony on behalf of the defendant.

In its present decision, the Majority of this Court goes further than did the Warren County Court. Whereas the lower Court rested its refusal of further medical testimony on the Commission's judgment, this Court sees a great imposition being foisted on the lower Court if it were required to hear additional medical testimony. The Majority Opinion sums it up as follows:

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> "If the court were required to reopen the proceedings for the introduction of additional testimony by medical experts on defendant's behalf, by like token

> it would be obliged to hear additional testimony by medical experts offered by the Commonwealth in rebuttal."

I fail to see the validity of this observation. I don't believe that if the defendant offered additional medical testimony and the Court were then obliged to hear additional testimony offered by Commonwealth medical experts in rebuttal, that this unspectacular procedure would cause the courthouse to collapse. Suppose the Commonwealth did present rebuttal testimony, who would be harmed by that presentation, so long as the evidence was relevant and enlightening? The Court has the duty to hear and appraise evidence, no matter how much, so long as it is competent and assists the judge in solving the problem submitted to him for adjudication. It is not enough merely to finish a case. It must be finished so that the aims of justice are met.

The Majority Opinion does not stop with complaining about the burden the Court would have to sustain in listening to testimony the Commonwealth might present in rebuttal. It goes on and says:

> "In fact there would be little power in the court to end the inquiry which would be indefinitely prolonged by the persistency and resourcefulness of counsel."

This is a *malapert non sequitur*. Any proposition can be made absurd by exaggerating it beyond what is normal and what is to be expected. Why wouldn't the Court have the power to end an inquiry which was stretching out into infinity and perpetuity? And why must defense counsel be satirized because he is seeking to obtain for his client the best medical advice possible? Why must he be subjected to contumely because he is trying to save the life of a person he believes to be mentally ill? Why must he beg for what is his right, as well as his duty to perform?

I dissent.

EXHIBIT C

Appendix C

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383 Pa. 318

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 192 January Term, 1955

COMMONWEALTH OF PENNSYLVANIA,
v.
NORMAN W. MOON,
Appellant.

Appeal from Order of the Court of Over and Terminer of Warren County at No. 1 February Sessions, 1954.

Filed October 4, 1955.

OPINION OF THE COURT.

CHIDSEY, *J.*

The pivotal and important question presented by this appeal is whether the Mental Health Act of 1951 changed the common law test for staying criminal proceedings after verdict but prior to sentence or execution. Inasmuch as appellant's motion for a new trial has not been argued and sentence has not been pronounced we are not concerned with possible trial errors or the merits of appellant's conviction.

On January 13, 1954 the appellant, Norman W. Moon, appearing before the Court of Quarter Sessions of Warren County on a charge of failure to comply with a support order, shot and fatally wounded the Honorable Allison D. Wade, President Judge of the 37th Judicial District. After apprehension, appellant was indicted, tried and on May

25, 1954 convicted of murder in the first degree. The jury rejecting appellant's sole defense of insanity, fixed the penalty at death. About two months thereafter, on July 31, 1954, while appellant was confined in the Warren County Jail pending disposition of his motion for new trial, the county sheriff, in his capacity as keeper of the jail, petitioned the court for the appointment of a sanity commission under Section 344 of the Mental

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Health Act of June 12, 1951, P. L. 533, as amended, 50 PS sec. 1224. This section of the Act provides, *inter alia*, that a petition for the commitment of any person detained in any penal or correctional institution who is thought to be mentally ill or in such condition that he requires care in a mental hospital, or who is thought to be a mental defective (except mental defectives convicted of first degree murder) may be made by counsel for the prisoner or the superintendent of the institution where defendant is detained or by any responsible person.

Without holding a hearing on the petition, the court by an order dated July 31, 1954, appointed a commission composed of two physicians and an attorney to investigate appellant's mental condition. After examining the defendant and holding hearings at which testimony and statements were taken, the commission on October 13, 1954 filed its report with the court in which it found the following ultimate facts:

> "a. Norman W. Moon is in fact mentally ill.
> b. Norman W. Moon's mental illness is that of dementia praecox of the paranoid type.
> c. This illness is chronic and continuing.
> d. Norman W. Moon is a proper subject for commitment to a mental hospital.".

The findings also contained answers to three specific questions submitted by the court on October 8, 1954, namely,

"(1) Regardless of what Moon's ideas or his feelings may be as to his own acts or behavior and although he may have a mental abnormality or illness, has he sufficient intelligence or mental ~~ability~~ to comprehend that by generally accepted standards an unjustifiable and inexcusable killing is considered to be wrong and a crime?

Answer. Yes, except during the two periods of acute mental disturbance that he has exhibited.

(2) Regardless of what Moon's ideas or his feelings may be as to his own acts or behavior and although he may have a mental abnormality or illness, has he sufficient intelligence or mental ability to comprehend that he has been tried by a jury which found him legally responsible for such a killing and guilty of murder in the first degree, and the jury also set death as the

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penalty which it felt was the proper one in his case?

Answer. Yes, except during the two periods of acute mental disturbance that he has exhibited.

(3) Regardless of what Moon's ideas or his feelings may be as to his own acts or behavior and although he may have a mental abnormality or illness, has he sufficient intelligence or mental ability to comprehend that if the penalty set by the jury is carried out and he is sent to the electric chair, it will be in punishment for the crime of which the jury found him guilty?

Answer. Yes, except during the two periods of acute mental disturbance that he has exhibited."[1]

After reviewing the evidence taken before the sanity commission and its report and, as well, the evidence adduced at the trial, the court below on October 21, 1954 filed an opinion and order finding appellant legally sane and ordering the proceedings to continue. Exceptions filed to this order by appellant were subsequently dismissed by an

[1] "The two periods of acute mental disturbance referred to in the answers to the three questions submitted by the court occurred, according to the commission's report, '* * * the first time in the jail at the time of his commitment and the second time while in the hospital after the Commission first met' and the commission found that 'On both occasions his disturbance promptly subsided'".

opinion and order dated February 9, 1955. This appeal followed. As the Mental Health Act of 1951 neither provides for nor prohibits an appeal to this Court where commitment is denied, review by certiorari may be had in the broadest sense and we may examine the record to determine whether the court's finding amounted to an error of law or an abuse of discretion as appellant contends: *Commonwealth v. Patskin*, 375 Pa. 368, 375, 100 A. 2d 472.

Prior to any legislation on the subject, Pennsylvania and the vast majority of other jurisdictions consistently followed and applied the common law principle that no insane person could be tried, sentenced or executed: *Commonwealth ex rel. Smith v. Ashe, Warden et al.*, 364 Pa. 93, 116, 71 A. 2d 107; *Commonwealth v.*

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Patskin, supra, p. 377. The common law concept of insanity to be applied by a jury in determining guilt where insanity is set up as a defense against conviction was the so-called "right or wrong" test laid down in *M'Naghten's Case*, 8 Eng. Rep. 718, 10 Cl. & Fin. 200, and subsequently adopted as the law of Pennsylvania in *Commonwealth v. Charles Mosler*, 4 Pa. 264. While the *M'Naghten* rule has been criticized, it remains the law of Pennsylvania when insanity is pleaded at trial: See *Commonwealth v. Carluccetti*, 369 Pa. 190, 200 (1952), 85 A. 2d 391. However, the test at common law and employed by the courts in determining the mental capacity of a defendant to stand trial or to be sentenced or executed is not the "*McNaghten* right or wrong" test but whether the defendant is able to comprehend his position and make a rational defense. In *Commonwealth v. Scovern*, 292 Pa. 26, 140 A. 611, at p. 29 it was stated: "A person who, by reason of his insanity, is unable to comprehend his position and to make a rational defense cannot be tried on a criminal charge

while in that condition * * *". In *Commonwealth v. Bergoo*, 317 Pa. 113, 176 A. 454, this Court said, quoting from Blackstone's Commentaries, "'* * * If, after he [the defendant] be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.'" As stated by Professor Weihofen in his book "Mental Disorder as a Criminal Defense" at p. 459: "After a verdict of guilty and before sentence is pronounced, if a defendant is found to be incapable of comprehending the nature and purpose of the proceedings or of stating any reasons that may exist why sentence should not be pronounced, sentence should be stayed and the defendant committed as an insane person until he recovers.".

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It is apparent from the three questions which the court submitted to the commission and the opinions accompanying its orders that it was of opinion that the common law test for determining mental capacity at this stage of the proceedings had not been altered by the Act of 1951. If this conclusion were sound, we would not hesitate in subscribing fully to the court's findings and order. The commission found as a fact that appellant "* * * knew why he was in jail * * *, knew that he faced a sentence in accordance with the jury verdict * * *, knows that he is on trial for his life * * *, recalls his trial * * *, admits that no one is justified in taking anyone else's life * * *, knows that it is not right to shoot anybody * * *, and what the consequences of his acts might be * * *". The commission examined the appellant at some length as to his ability to cooperate with his attorneys, but made no specific find-

ing in this regard. Appellant's attorneys made statements before the commission that appellant was unable to adequately cooperate with them, but the court, stating that "The defendant's own words and thoughts, as expressed by him in his own testimony before the Sanity Commission, refute these opinions.", found that "* * * the defendant, understands the nature of the proceedings against him, comprehends his position in relation thereto, and is able to cooperate with his attorneys, * * *". We have read all of defendant's testimony, not only before the sanity commission but at his trial, and are satisfied that, under the law as it existed prior to any legislation on the subject, the court below committed no error of law nor any abuse of discretion. However, the question presents itself whether the common law test has been superseded in Pennsylvania by statutory enactment.

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The history of legislation dealing with the custody of persons charged with and acquitted or convicted of crime who become mentally ill begins with the Act of May 14, 1874, P. L. 160, but for purposes of this case we are particularly concerned with the present Mental Health Act of 1951 and its predecessor, the Act of July 11, 1923, P. L. 998. Section 308 of the Act of 1923 provided: "When any person *detained in any prison*, whether waiting trial or undergoing sentence * * * shall, in the opinion of the * * * warden, * * * be *insane*, or in such condition as to make it necessary that he be cared for in a hospital for mental diseases, the said * * * warden, * * * shall immediately make application, * * * to a law judge of the court having jurisdiction of the charge against said person, or under whose order he is detained, for commitment of said person to a proper hospital for mental diseases. The said judge

shall forthwith order an inquiry * * * by a commission * * * who shall immediately examine the said person and make written report of their findings to the said judge * * *. The said judge may, in his discretion, summon other witnesses and secure further evidence. If he is then satisfied that the person thought or alleged to be *insane* is in fact *insane*, he shall order the removal of such person to a hospital for mental diseases * * *". (Emphasis supplied). We construed the language "any person detained in any prison, whether waiting trial or undergoing sentence" as including a person sentenced to death, since a part of his sentence is that he be imprisoned until his execution: *Commonwealth ex rel. Smith v. Ashe, Warden et al., supra*, p. 117. To this extent the 1923 Act adopted the common law rules relative to a stay of execution for a defendant who became insane subsequent to verdict.

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The Mental Health Act of June 12, 1951, P. L. 533, as amended, 50 PS sections 1071-1622, was the first general revision and comprehensive codification of the Mental Health Laws since the Act of 1923. Under Section 343 of this Act the trial court is empowered to defer sentence and order a mental examination of any person convicted of a crime punishable by sentence to a penal or correctional institution. While this section would appear to restrict the application of the Act solely to persons convicted of crimes punishable by sentence to a penal institution, as previously indicated, Section 344 covers persons *detained* in any penal institution and it impliedly includes persons convicted of first degree murder who are mentally ill by expressly excluding from that classification only mental defectives: Cf. *Commonwealth ex rel. Smith v. Ashe, Warden et al., supra*. Section 345 of the Act provides that after

receipt of the application for commitment and notice to the prisoner's counsel and an examination of the person sought to be committed by a commission." (d) *If the court is satisfied* that the person sought to be committed is *mentally ill* or *mentally defective*, it shall order the commitment or transfer of such person to a mental hospital or an institution for mental defectives. * * *". (Emphasis supplied).

It will be readily observed that the basic dissimilarity between Section 345 of the Act of 1951 and Section 308 of the Act of 1923 is the substitution of the words "mentally ill or mentally defective" in the later enactment for the term "insane" in the earlier Act. This difference in terminology is employed with substantial uniformity through the 1951 Act. On the ground that this change of language in the 1951 legislation signifies a change of meaning by the Legislature in order to bring penology into closer accord with present day medical science, appellant contends that the court below abused its discretion and committed an error of law in applying the common law test of insanity rather than the statutory standard of mental illness. It is a canon of statutory

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construction that where words of a later statute differ from those of a previous one on the same subject, they presumably are intended to have a different construction: *Fidelity Trust Company v. Kirk et al.*, 344 Pa. 455, 25 A. 2d 825; *Pauk v. Didra*, 370 Pa. 488, 88 A. 2d 730; *McFarland Estate*, 377 Pa. 290, 296, 105 A. 2d 92.

The term "mental illness" is defined in Section 102(11) of the 1951 Act as "* * *an illness which so lessens the capacity of a person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to

be under care. The term shall include 'insanity', 'unsoundness of mind', 'lunacy', 'mental disease', 'mental disorder' and all other types of mental cases, but the term shall not include 'mental deficiency', 'epilepsy', 'inebriety', or 'senility', unless mental illness is superimposed.". (Emphasis supplied). Although this definition includes insanity, we disagree with the lower court's conclusion that it comprehends only legal insanity. It also expressly embraces "'mental disease', 'mental disorder' and all other types of mental cases", thereby indicating that the statute was intended to comprise mental abnormalities which would not come within the strict connotation of the term legal insanity. Where the lawmaking body has the power to enact legislation in a particular field, as it has here, and has manifested its intention, we are not at liberty to distort the language of the enactment and by judicial legislation provide for what we might consider a more socially desirable result: *Mamlin v. Genoe et al.*, 340 Pa. 320, 17 A. 2d 407. When Section 345 of the 1951 Act is read in conjunction with the statutory definition of mental illness, we think it plain beyond cavil that the Legislature has broadened the test to be used in staying criminal proceedings.

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To what extent has the test been enlarged? At first glance the wordage of the Act would make it appear that every conceivable type of mental illness, with the exception of those specifically excluded, would fall within its scope and require commitment. Upon closer scrutiny it becomes evident that the controlling factor is the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnose a mental illness. This conclusion is confirmed by Section 345(c) of the Act which

provides that "On the report of the examiner that the defendant is *so* mentally ill or defective that it is advisable for his welfare or the protection of the community that he be committed to other than a penal or correctional institution, the court may commit him. * * * If the examiner's report indicates no *such* mental illness or deficiency, he shall be sentenced as in other cases." (Emphasis supplied.) Here the commission found that appellant possessed well marked symptoms of psychosis which it further characterized as dementia praecox.[1] This condition, a recognized form of mental disorder was, if justifiably diagnosed, within the purview of the Act, but having resolved that appellant was mentally afflicted, the determinative issue was whether that illness *so lessened* his capacity to use his customary self-control, judgment and discretion as to render it necessary or advisable for him to be under care. As clearly delineated in the statutory definition, this is the standard which the Legislature promulgated to guide the commission and the court.

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Assuming the commission found appellant a proper subject for commitment under this standard, its findings while persuasive were nevertheless advisory only and not mandatory upon the court, for under Section 345(d) of the Act it is the court and not the commission which must be satisfied that appellant is mentally ill under the standard prescribed. It follows that the court in the instant case could have rejected, although not arbitrarily or capriciously, the commission's findings and conclusions and could have

[1] In its opinion dismissing the exception to its order, the court said: "* * * it seems likely to the court that the symptoms on which the members of the Sanity Commission based their opinion that Norman W. Moon was mentally ill might well be exhibited by any one convicted of murder in the first degree by a jury, which set the death penalty, under the stress of his confinement and contemplation of his fate." * * *

independently determined from the evidence that appellant's capacity to use his customary self-control, judgment and discretion had not been so lessened that it was necessary or advisable for him to be under care. In view of the fact, however, that the court, in misapprehending the effect and intendment of the 1951 Act, did not apply this standard it thereby committed an error of law, and we have no way of ascertaining whether it would have arrived at a similar conclusion under the criterion so laid down. Accordingly the commission's findings and recommendation must be re-examined and the evidence reconsidered by the court together with any additional relevant evidence in the light of the statutory definition of mental illness.

The order of the court below is reversed and the record is remanded for procedure consonant with this opinion.

BELL, J. FILES CONCURRING AND DISSENTING IN PART OPINION.

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IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 192 January Term, 1955.

COMMONWEALTH OF PENNSYLVANIA, v. NORMAN W. MOON, *Appellant.*	Appeal from Order of the Court of Oyer and Terminer of Warren County at No. 1 February Sessions, 1954.

OPINION CONCURRING IN PART AND DISSENTING IN PART

Filed October 4, 1955.

BELL, *J.*

Justice CHIDSEY's opinion is excellent as far as it goes, but in two respects it does not go far enough.

The defendant was convicted of murder in the first degree; the jury rejected defendant's defence of insanity and fixed the penalty at death. A motion was made by defendant for a new trial but before that motion was disposed of and *before sentence*, petition was presented to the Court for the appointment of a Sanity Commission under *section 311* of the Mental Health Act of June 12, 1951, P. L. 533, as amended. Commitment was denied by the lower Court and the defendant took this appeal.

In *Commonwealth v. Patskin*, 375 Pa. 368, 100 A. 2d 472, where the appeal *sur* the petition for commitment was taken *after conviction of murder and sentence thereon*, we said (page 375):

"The Mental Health Act of 1951 is silent on the question of appellate review where commitment is denied. The law is now well settled that where the statute is silent on the question of appeal a review by certiorari may be had "in the broadest sense" and the court may consider the record, including the testimony, to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made.": Kaufman Construction Co. v. Holcomb, 357 Pa. 514, 519, 55 A. 2d 534; Commonwealth v. Cronin, 336 Pa. 469, 474, 475, 9 A. 2d 408; 411; Bureau of Highway Safety v. Wright, 353 Pa. 307, 49 A. 2d 783; Bangor

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Electric Co.'s Petition, 295 Pa. 228, 232, 145 A. 128; Clarke's Case, 301 Pa 321, 326, 152 A. 92, 94.

"If a commission is appointed its findings are advisory and not mandatory upon the Court—under the Act it is the Court and not the psychiatrist or the Sanity Commission which must be satisfied that the petitioner is insane or mentally ill. (Subsection (d) of section 345.)"

Four important questions arise: (1) Is the appeal interlocutory; (2) What was the applicable test prior to the Mental Health Act of 1951; (3) What is the meaning of the Mental Health Act, as amended January 14, 1952 (1952), P. L. 2053, so far as it is applicable to persons convicted or sentenced for murder; and (4) Is this section of the Act valid?

The Court below after reviewing the evidence taken before the Sanity Commission and its report, as well as the evidence taken at the trial of the murder indictment, found that the defendant was *at the time of the petition legally sane*, refused the commitment, and ordered the proceedings in the criminal trial to continue.

All of the members of this Court are in accord: (1) That we will never knowingly permit an insane man to be

tried or sentenced or executed: *Commonwealth v. Patskin*, 375 Pa., *supra* (p. 377); *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 116, 71 A. 2d 107; *Commonwealth v. Scovern*, 292 Pa. 26, 140 A. 611; Blackstone's Commentaries, Book IV, section 24, page 1440; 3 Coke's Inst. 4; (2) That when insanity is set up as a defense in a criminal trial the M'Naghten Rule (the right or wrong test) applies i.e., did the defendant know the nature and consequences of his act and the difference between right and wrong: *M'Naghten's Case*, 10 Cl. &

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Fin. 200 (1843); *Commonwealth v. Patskin*, 375 Pa. *supra*; *Commonwealth v. Heller*, 369 Pa. 457, 87 A. 2d 287; *Commonwealth v. Neill*, 362 Pa. 507, 67 A. 2d 276; and (3) the test applicable for a continuance because of alleged insanity or mental incapacity is not the right or wrong test, but the ability of the accused to comprehend the existing situation and to make or aid his counsel in making a proper defense: *Commonwealth v. Ragone*, 317 Pa. 113, 124, 176 A. 454; *Commonwealth v. Scovern*, 292 Pa. 26, 140 A. 611. The humanitarian reason for this test is likewise the basic reason for the Mental Health Acts.

The petition for commitment under the Mental Health Act was an inseparable part of the case of Commonwealth v. Moon *sur* the indictment and trial for murder. The evidence taken a the murder trial was, as we have seen, relevant in the consideration and determination of the petition for commitment. The first question that arises therefore is:

When, in the preservation of Justice for all, and in the orderly administration of Law, should an appeal to this Court be allowed where the sanity or mental illness of a

person convicted of murder (or voluntary manslaughter), but not yet sentenced, is raised?

The general rule is long and well established that a defendant has no standing to appeal, even after conviction, where no sentence or other final judgment has been entered against him: *Commonwealth v. Hall*, 173 Pa. Superior Ct. 285, 98 A. 2d 386; *Commonwealth v. Hicks*, 173 Pa. Superior Ct. 200, 85 A. 2d 622; *Commonwealth v. Graham*, 170 Pa. Superior Ct. 343, 85 A. 2d 632;

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perior Ct. 395, 98 A. 2d 478; *Commonwealth v. Traylor*, *Commonwealth v. Feldman*, 159 Pa. Superior Ct. 3, 46 A. 2d 332; *Commonwealth ex rel. Holly v. Asher*, 368 Pa. 211, 82 A. 2d 234.

In *Commonwealth ex rel. Holly v. Asher*, 368 Pa., *supra*, the Court said (page 218): "'Appeals may not be taken in criminal proceedings where judgment of sentence has not been passed.'".

In *Sullivan v. Philadelphia*, 378 Pa. 648, 107 A. 2d 854, the Court said: "Even with the consent of all interested parties, appellate jurisdiction of an interlocutory order or decree may not be assumed: Stadler v. Mt. Oliver Borough, [373 Pa. 316, 95 A. 2d 776]. The evident policy of the law in such regard is to preclude piecemeal determinations and the consequent protraction of litigation.".

Especially in those cases where insanity or mental inability to properly defend himself is offered as a reason (for acquittal or) for a stay or a continuance of further proceedings, Pennsylvania has been very liberal in sustaining the rights of any person accused of crime. For example, in Commonwealth v. Patskin, 375 Pa., *supra*, the defendant, subsequent to conviction and sentence for mur-

der and after affirmation thereof by this Court, petitioned for commitment under the Mental Health Act. This Court allowed an appeal since the Order of the Court below which dismissed the petition was a *final* Order; and on the basis of a broad certiorari we reviewed the entire record in that hearing and in the criminal case. But that case does not justify an appeal *before sentence* from an Order refusing commitment or from any other interlocutory Order.* Under similar circumstances, Courts of our sister

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States have refused review of any nature: *Bingham v. State*, 82 Okl. Cr. 305, 169 P. 2d 311; *Bulger v. People*, 61 Colo. 187, 156 P. 800; *Darnell v. State*, 24 Tex. App. 6, 5 S. W. 522; *State ex rel. Lyons v. Chretien*, 114 La. 81, 38 So. 2; *Ex parte Chesser*, 93 Fla. 590, 112 So. 87.

In *People v. Ross*, 344 Ill. App. 407, 101 N. E. 2d 112; in *People v. Cornelius*, 332 Ill. App. 271, 74 N. E. 2d 900; and in *Crocker v. State*, 60 Wis. 553, 19 N. W. 435, the defendant was found to be insane by the trial Court before or during the trial; nevertheless an appeal from an Order of Commitment was dismissed on the ground that the Order was interlocutory and therefore non-appealable.

This appeal should *a fortiori* be quashed (1) because it is clearly interlocutory; and (2) because of the Act of

* This Court has consistently quashed as premature or interlocutory, appeals from orders, judgments or decrees which did not constitute a final disposition of the case, even though such "quashing" (a) necessitated trials or proceedings which often proved unnecessary and at times were obviously so, and (b) unnecessarily cost the party-appellant large sums of money, as well as waste of time and effort and considerable mental strain. See: *McGee v. Sinaley*, 382 Pa. 18, 114 A. 2d 141; *Sullivan v. Philadelphia*, 378 Pa. *supra*; *Epstein v. Kramer*, 374 Pa. 112, 96 A. 2d 912; *Stadler v. Mt. Oliver Borough*, 373 Pa. 316, 95 A. 2d 776; *O'Hara Township Election Case*, 370 Pa. 250, 87 A. 2d 788; *Mackozain v. Gulf Oil Corp.*, 369 Pa. 581, 87 A. 2d 314; *Marsh v. Commonwealth*, 16 S. & R. 318; *Bingham v. State*, 82 Okl. Cr. 305, 169 P. 2d 311; *Bulger v. People*, 61 Colo. 187, 156 P. 800; *Darnell v. State*, 24 Tex. App. 6, 5 S. W. 522; *State ex rel. Lyons v. Chretien*, 114 La. 81, 38 So. 27; *Ex parte Chesser*, 93 Fla. 590, 112 So. 87. Even though I believe some of these decisions were unwise, they represent the law of Pennsylvania

March 31, 1860, P. L. 427, section 57; and (3) because of section 347 of the Mental Health Act of 1951, as amended, *supra;* and (4) because the allowance of an appeal, if a commitment be ordered before the motion for new trial is disposed of, may result in injustice to the law-abiding people of Pennsylvania.

The Act of March 31, 1860, P. L. 427, section 57, which governs appeals in homicide cases, reads as follows: "*Upon the trial of any indictment for murder*" or voluntary manslaughter, it shall and may be lawful for the defendant or defendants to except to any decision of the court upon any point of evidence or law, which exception shall be noted by the court, and filed of record as in civil cases, and a writ of error to the supreme court may be

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taken by the defendant or defendants, *after conviction and sentence.*" This section of the Act is clear; it has never been amended, and it should be construed by the Courts in accordance with its clear meaning and intent.

Section 347 of the Mental Health Act of 1951, as amended, *supra*, provides (page 2067):

> "Section 347. Effect of Commitment on Pending Criminal Proceedings.—
>
> *If any person is committed* while awaiting indictment or trial, or has been arraigned or is being tried, proceedings against him shall be stayed until his recovery or sufficient improvement of condition. Upon his recovery or sufficient improvement of condition, if he was previously confined in a penal or correctional institution, he shall be returned upon proper order of the court to the penal or correctional institution from which he was transferred, for the disposition of the charges against him. If he was committed before

* Italics throughout, ours.

trial, he shall be returned to the court having jurisdiction of him, for trial or such other disposition of such charges as the court may make."

Criminal proceedings against a defendant are to be stayed only if he is mentally ill and then only if he was committed while awaiting indictment or trial, or while he was being tried. Defendant obviously does not fall within this section.

Equally clarifying and analogous, section 343 (d) of the Mental Health Act of 1951, *supra*, provides (page 555): "(d) *When a defendant is committed to an institution, an appeal shall lie* in the same manner and with like effect *as if sentence* to a penal or correctional institution had been imposed, and may be taken by defendant or his counsel." This defendant was never committed and therefore an appeal is not authorized.

Moreover, if this defendant is committed before his motion for a new trial is disposed of, it may be many many years

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before he appears in Court for a re-determination of his sanity or mental condition. In the meantime the Court may forget what happened at the trial when it comes to passing upon some alleged trial errors and other trial matters *particularly within the knowledge of the trial Judge*, or the trial Judge may die; also there will likely be a loss of witnesses or at least a dimming of their recollection. Dilatory or delaying tactics are well known devices employed by criminals to obstruct or defeat justice and such tactics or motions should be rejected by the Courts whenever reasonably possible.

On the other hand, if the lower Court first disposes of defendant's motion for new trial and then imposes a sen-

tence upon the verdict and orders or refuses commitment, this Court can still preserve to defendant all his legal rights, including the question of his sanity or mental illness and his ability to aid counsel in properly defending him and/or in preparing a motion and reasons for a new trial. Moreover, it is pertinent to note that these questions can be determined by this Court within a period of a few months.

In the light of all the cases hereinabove cited and of the said Acts, and for the additional reasons hereinabove set forth, it is clear that the appeal in this case is untimely, premature, and interlocutory and should be quashed.

Three cases are relied on to sustain this appeal; all of them are so extraordinary in their facts as to stand alone and furnish no precedent for a case such as the instant one. In *Commonwealth v. Regone*, 317 Pa. 113, 176 A. 454, defendant was convicted of murder with the penalty of life imprisonment. Although the time was ripe for sentence the trial Judge *refused* to sentence the defendant, but instead committed him. The Court wisely allowed defendant's appeal and said: "It is true that the rule is that 'there must be a final judgment or something in the nature of a final judgment before it is ripe for review in this court.' But

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this rule has, in exceptional cases and to safeguard basic human rights, been construed as not being one of unyielding flexibility." Moreover, in that case *all* of the experts for the Commonwealth and for the defendant agreed before the trial that defendant was insane at the time of the killing and also at the time of the trial, and even the District Attorney protested to the trial Judge against the trial of a man whom they all agreed was insane.

In *Commonwealth v. Trunk, et al.*, 311 Pa. 555, 167 A. 333, several defendants were tried together on a number of indictments charging offenses all of which were part of a continuous series of events, and the Court felt it was an injustice to the defendants to sentence them on certain indictments and suspend sentence on others. Under these peculiar circumstances the Court allowed an appeal from the indictments upon which sentence was suspended, as well as from the judgments of sentence. This Court recognized the general rule but held that under the exceptional facts there present, there was an abuse of judicial discretion in suspending sentence upon the bills upon which the Court below did not act.

In *Commonwealth v. Kilgallen*, 379 Pa. 315, 108 A. 2d 780, this Court allowed an appeal from the refusal of a motion to quash criminal indictments because the nature of the charges vitally *affected the public interest* and the defendant's constitutional rights were palpably violated, and the exceptional circumstances justified us in entertaining the appeal.

Obviously there is nothing so exceptional about the present status of the defendant as to bring him within the exceptional cases above set forth or require a departure from the well established rule. This long established principle of non-appealability of interlocutory orders, *especially in criminal cases*, prevents piecemeal determination of such cases and thus enables the Court to more wisely and justly determine the questions involved in the light of *all* the facts and circumstances as disclosed

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by the evidence and the entire record. Equally important, it eliminates costly and time-consuming delays in the orderly and speedy administration of justice and places a

needed restriction upon the well known practice of criminals to obstruct or defeat justice by resorting to every conceivable technicality, dilatory motions, and delaying tactics.

For all these reasons I would, I repeat, quash this appeal.

If the appeal is not quashed, we should affirm the judgment of the lower Court.

The Mental Health Act of 1951

The basic purpose of the Mental Health Acts is worthy i.e., to protect by hospitalization and medical care those who are *really* mentally ill. The Acts should be read in the light of that purpose and should not be used as a device to allow dangerous criminals to escape just punishment for their crimes, viz., life imprisonment in jail or execution in murder cases. The main purpose of such punishment, it is often forgotten, *is to deter crime and protect society.*

An Act or a section of an Act will be declared invalid and void when it is so indefinite or uncertain or so vague or ambiguous or confusing or its provisions are so inconsistent or conflicting or incomplete that the Courts are unable to determine, with any reasonable degree of certainty, what the Legislature actually intended: *Panther Valley Television v. Summit Hill*, 376 Pa. 375, 102 A. 2d 699; *Miller v. Belmont Co.*, 268 Pa. 51, 63, 110 A. 802; *Commonwealth v. DePoli*, 362 Pa. 229, 66 A. 2d 649; *Gratton v. Conti*, 364 Pa. 157, 71 A. 2d 280; *Murray v. Philadelphia*, 364 Pa. 578, 73 A. 2d 381; *Sablosky v. Messner*, 372 Pa. 47, 92 A. 2d 411; *Commonwealth v. Hallberg*, 374 Pa. 554, 97 A. 2d 849. Moreover, it should likewise be de-

clared inoperative and void if the only meaning which can reasonably be given it will produce a result which is absurd, since there is a presumption that the Legislature never intended an unreasonable and absurd result. Cf. Act of May 28, 1937, P. L. 1019, section 52, 46 PS 552.

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As so often happens in a very long Act, some provisions thereof are uncertain or confusing or inconsistent or conflicting.

Section 344 considered and construed with section 343 and section 102 of the Mental Health Act of 1951, P. L. 533, as amended 1951, January 14 (1952), P. L. 2053, is indefinite and uncertain and its provisions construed with others are conflicting, inconsistent and absurd.

Section 344 (a) (1), (2) and (c) (pages 2065-2066) reads as follows:

"(a) Petition for commitment of—

(1) Any person detained in any penal or correctional institution who is thought to be mentally ill or in such condition that he requires care in a mental hospital, or who is thought to be a mental defective [or epileptic].

(2) Any person charged with a crime and released on bail pending trial who is thought to be mentally ill or a mental defective [or epileptic] may be made to the court under the order of which such person is detained or which has jurisdiction of the charge.

. . .

(c) *No application shall be made for the commitment of any mental defective convicted of first degree murder.*"

Section 344 says that a person who is mentally ill or a mental defective who is detained in jail may be committed to a mental hospital unless he is a mental defective who

has been convicted of first degree murder. In other words, a mental defective who is in jail and indicted for murder can be put in a mental hospital and never tried for murder, but if he has been convicted of first degree murder he cannot be committed to a mental hospital. This is so absurd that it could not have been the intent of the Legislature and cannot be sustained.

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"Section 343. Commitment of Convicted Person in Lieu of Sentence After Report of Psychiatrist. (a) Whenever any person is convicted of a crime punishable by sentence to a penal or correctional institution, the trial court may defer sentence and order a mental examination of the defendant to guide it in determining his disposition. Such action may be taken on the court's initiative, or on the application of the district attorney, the defendant, or his counsel or other person acting in his interest." This all embracing section makes no exceptions. It pertains just as much to every mental defective who is convicted of first degree murder as does section 344. Section 344 (c) is inconsistent with and conflicting with (a) section 343 as well as with (b) Art. VII, section 701, Murder, etc., Penal Code of 1939, P. L. 872, which authorizes the jury or the Court to fix the penalty at life imprisonment or death, and with (c) prior decisions of this Court which hold that a mental defective can be tried and convicted of murder and executed pursuant to sentence thereon.

Section 102 (9), page 2055, defines a *mental defective* as "a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment and discretion to manage himself and his affairs, and for whose welfare or that of others care is necessary or advisable. The term shall include

'feeble-minded,' 'moron,' 'idiot' and 'imbecile,' but shall not include 'mental illness,' 'inebriate' and 'senile'."

Section 102 (11), page 2055, defines *mental illness* as "an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include 'insanity,' 'unsoundness of mind,' 'lunacy,' 'mental disease,' 'mental disorder,' *and all other types of mental cases*, but the term shall not include 'mental [defectiveness] deficiency,' 'epilepsy,' 'inebriety,' or 'senility,' unless mental illness is superimposed."

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Section 102 (9) and section 102 (11) apply equally to and equally govern a person who has not enough self-control, judgment and discretion to manage his own affairs and who for his own welfare *or that of others* needs care. A mental defective (a feeble minded person or moron) never possessed the above characteristics, to wit, such self-control, judgment and discretion; the lunatic, the insane and all persons suffering from any other mental illness, possessed them but lost them. The care, treatment and punishment for each mental class is equal except as to persons who may be *convicted* of first degree murder, in which case the mentally ill person who is otherwise sane, but has a delusion that he is Babe Ruth or Caruso or Napoleon or President of the United States, or has some other mental disorder or mental illness less severe than insanity, goes to a hospital and the mental defective, who is less able to exercise self-control, judgment and discretion, goes (as under our cases and under section 344 (e) he must) to the death chair or imprisonment in jail for life. There is no legal or humanitarian justification

for such a distinction. It is contrary to the decided cases and if the Legislature wishes to permit a convicted murderer who is neither insane nor a mental defective to escape execution or life imprisonment in jail, it is not asking too much to require it to amend the Penal Code and to clearly and unequivocally say so.*

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To summarize: I would quash this appeal as interlocutory for the reasons hereinabove set forth. If the appeal is considered on its merits, I would hold that section 344 of the Mental Health Act, purportedly relating to persons detained in jail or convicted of murder, is, when considered with other sections of the Mental Health Act and with the Act of March 31, 1860, so confusing, conflicting, uncertain and absurd, as to be void. I would therefore sustain the insanity test applied by the Court below and would remand the case to the lower Court for disposition of defendant's motion for a new trial and a sentence on the verdict or such other decision as it deems proper not inconsistent with this opinion.

* See also section 342 of the Mental Health Act, which provides: "Whenever any person *charged with crime*, upon production or appearance before the court, appears to be mentally ill or in need of care in a mental hospital, the court shall designate a responsible person to apply for his commitment." ". The mental defective is not provided for by this section or any similar section of the Act even though by definition, he is suffering from the same loss of self-control, judgment and discretion as the person suffering from mental illness, and both are equally dangerous to society.

EXHIBIT D

Appendix D

(Warren County Court Opinion.)

OPINION.

(January 28, 1956)

The question is now before the Court for the second time as to whether the mental condition of the defendant in this case, who was convicted of murder in the first degree by a jury which rejected his sole defense of insanity and set the death penalty is such that he should be committed to a mental hospital, or proceedings in his case should continue.

This question was first before the Court, when, on July 21, 1954, the Sheriff and Keeper of the Warren County Jail petitioned the Court for the appointment of a Sanity Commission to determine the defendant's mental condition. Without a hearing, but after consultation with the Sheriff and with the defendant's counsel who was about to file a similar petition, a Commission was appointed which examined the defendant, those who had guarded him in the jail, and the doctors who examined him. On October 13, 1954, the Commission filed its report with the Court together with the transcription of the testimony given by the defendant and others before the Commission and statements by defendant's counsel and the members of the Commission. All of this, together with the entire record of the case, was carefully examined by the Court and on October 21, 1954 an Opinion was handed down finding the defendant legally sane and an order made that proceedings in this case continue. Exceptions were dismissed by further Opinion and Order dated February 9, 1955 and defendant appealed to the Supreme Court. On October 4,

1955, the Supreme Court handed down its Opinion, by Mr. Justice Chidsey, with dissenting opinion by Mr. Justice Bell, reversing this Court's Order of February 9, 1955 and directing this Court to re-examine the findings of the Sanity Commission and to reconsider the evidence, together with any additional relevant evidence, in the light of the statutory definition of mental illness under the Mental Health Act of 1951. It is this Opinion of the Supreme Court which brings before this Court, for the second time, the question as to whether this defendant should be committed or proceedings in his case should continue.

The aforesaid Opinion of the Supreme Court of Pennsylvania, Commonwealth v. Moon, 117 At. 2nd 96, said that if the common law test for determining the mental capacity of the defendant, after verdict and before sentence, had not been altered by the Mental Health Act of 1951, the Supreme Court would not hesitate in subscribing fully to this Court's findings and Order, and that, after reading all of defendant's testimony, not only before the Sanity Commission but at his trial, the Court was satisfied that, under the law as it existed prior to any legislation on the subject, the Court below committed no error of law nor any abuse of discretion, see page 100. The Supreme Court also referred to the Act of 1923, which provided for a method of inquiring into the mental condition of a criminal defendant and further provided that if the Judge was satisfied that a defendant thought or alleged to be insane, was, in fact, insane, he was to order removal of such person to a hospital for mental diseases, as adopting the common law rules relative to a stay of execution for a defendant who became insane subsequent to verdict, see page 101.

The Supreme Court then pointed out that Section 345 of the Mental Health Act of June 12, 1951, P. L. 533, as amended, substituted the words "Mentally ill or mentally

defective" for the term "insane" in Section 308 of the 1923 Act, and, the words of the later statute, differing from those of the previous one on the same subject, presumably were intended to have a different construction. The Supreme Court then quoted the definition of mental illness as set forth in Section 102(11) of the 1951 Act and said, beginning on page 101:

> "When Section 345 of the 1951 Act is read in conjunction with the statutory definition of mental illness, we think it plain beyond cavil that the Legislature has broadened the test to be used in staying criminal proceedings.
>
> To what extent has the test been enlarged? At first glance the wordage of the Act would make it appear that every conceivable type of mental illness, with the exception of those specifically excluded, would fall within its scope and require commitment. Upon closer scrutiny it becomes evident that controlling factor is the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnose a mental illness * * *. Here the commission found that appellant possessed well marked symptoms of psychosis which it further characterized as dementia praecox. This condition, a recognized form of mental disorder was, if justifiably diagnosed, within the purview of the Act, but having resolved that appellant was mentally afflicted, the determinative issue was whether the illness so lessened his capacity to use his customary self control, judgment and discretion as to render it necessary or advisable for him to be under care. As clearly delineated in the statutory definition, this is the standard which the Legislature promulgated to guide and commission and the court.
>
> Assuming the commission found appellant a proper subject for commitment under this standard, its findings while persuasive were nevertheless advisory only and not mandatory upon the court, for under Section 345 (d) of the Act it is the court and not the commission which must be satisfied that appellant is mentally ill under the standard prescribed. It follows that the

Court in the instant case could have rejected, although not arbitrarily or capriciously, the commission's findings and conclusions and could have independently determined from the evidence that appellant's capacity to use his customary self control, judgment and discretion had not been so lessened that it was necessary or advisable for him to be under care. In view of the fact, however, that the court, in misapprehending the effect and intendment of the 1951 Act, did not apply this standard it thereby committed an error of law, and we have no way of ascertaining whether it would have arrived at a similar conclusion under the criterion so laid down. Accordingly the Commission's findings and recommendation must be re-examined and the evidence reconsidered by the court together with any additional relevant evidence in the light of the statutory definition of mental illness.

The order of the Court below is reversed and the record is remanded for procedure consonant with this Opinion."

The statutory definition of mental illness, as set forth in Section 102 of the Act of 1951, 50 PS 1072, is as follows:

"(11) 'Mental Illness' shall mean an illness which so lessens the capacity of a person to use his customary self control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include 'insanity', 'unsoundness of mind', 'lunacy', 'mental disease', 'mental disorder', and all other types of mental cases, but the term shall not include 'mental deficiency', 'epilepsy', 'inebriety' or 'senility', unless mental illness is superimposed."

Proceeding in a manner consonant with the Supreme Court's Opinion, this Court has, in the light of this statutory definition, re-examined the findings and recommendation of the Sanity Commission, has reconsidered the evidence, and has also heard additional relevant evidence.

The ultimate facts found by the Commission are that the defendant, Norman W. Moon, is mentally ill, of dementia

praecox of the paranoid type, and illness chronic and continuing, and that he is a proper subject for commitment to a mental hospital. The Commission bases its diagnosis and recommendation on facts which it found from the testimony which it heard from the Warden and the guards of the Warren County Jail where the defendant was confined, the defendant himself, the psychologist and psychiatrist at the Warren State Hospital to which the defendant was temporarily removed for the purpose of examination, and also the testimony of the Commission members as to their personal examination of the defendant and their personal knowledge of him. Transcription of all of this testimony taken before the Commission, together with the statements by defendant's counsel and by members of the Commission, was filed with the Commission's Report. All of this record has been carefully re-examined by this Court.

The diagnosis made by the Sanity Commission was the defendant was afflicted with a mental disorder known as dementia praecox. In the words of the Supreme Court, this condition, a recognized form of mental disorder, was, if justifiably diagnosed, within the purview of the Act. This Court has grave doubts as to whether the diagnosis is justified for it seems likely to the Court that the words, actions and attitudes of the defendant on which such diagnosis was based, which are summarized as findings of the Commission in Paragraph Seven of its Report (pages 2, 3 and 4) are caused by the predicament in which the defendant finds himself, the cause and consequence of which he fully understands according to his own testimony, and also the stress of his confinement and the contemplation of his fate, rather than a disease of the mind. However, it is not necessary to determine the purely medical issue as to whether the diagnosis made by the Commission is justified in this case, for as said by the Supreme Court, the controlling factor is not

the bare existence of symptoms which would induce a psychiatrist to diagnose a mental illness but the degree or extent to which the mind is affected thereby. The determinative issue is whether the mental illness with which the defendant was found to be afflicted so lessened his capacity to use his customary self control, judgment or discretion as to make it necessary or advisable for him to be under care.

In its Report, the Sanity Commission found the defendant to be mentally ill and a proper subject for commitment to a mental hospital but the Commission did not find that the defendant's mental illness so lessened his capacity to use his customary self control, judgment and discretion as to render it necessary or advisable for him to be under care. From the record in this case it is obvious that no such finding was made because the symptoms on which the diagnosis was based did not indicate any such lessening in defendant's capacity to use his customary self control, judgment or discretion. In Paragraph seven of its Report (pages 2, 3 and 4) the Commission gave its findings as to the symptoms on which this diagnosis was based. These findings, which are fully set forth in the Court's Opinion of October 21, 1954, may be summarized as follows:

On and after his conviction on May 25, 1954, the defendant was a prisoner in the Warren County Jail and manifested no abnormalities until about two weeks prior to the appointment of the Commission on July 31, 1954 (the statement of Dr. Walters, a Commission member (page 48 of the Sanity Commission Record) contains the following statement: "Here is a man that showed no abnormalities from the time of my introduction to him on the operating table through two weeks of hospital care and five months of observation in the jail, to a general deterioration within the last two weeks I would say, to one who manifests a marked change of personality"). Then he began to be slov-

only in his personal habits, irritable at times with his guards, freer in the use of filthy language, and at times sat around in the nude, indulged in self abuse, was awake at night leaving lights on, played with his food and wrote on the walls. This conduct culminated in a disturbance which he created on July 31, 1954, piling up furniture and sitting on top for some time while he reflected light from a paper, used abusive language and refused to come down. This conduct led to the Sheriff's petition, the appointment of a Sanity Commission and defendant's temporary confinement at the Warren State Hospital for observation. While there he showed a behavior-pattern of irrelevant and garrulous conversation with rigid outward emotional control, at times touching his forehead or touching the person he was talking to; he showed overconcern with religious matters without emotional feeling therefor, at times dissociated thinking processes, a pseudo-philosophical attitude not in keeping with his circumstances, unreasonable demands as to what he conceived to be his rights, a conversational pattern stimulated almost entirely by his external surroundings, evasiveness as to previous behavior, unnatural and spontaneous word-association, resentment for what he believed to be a false accusation by a guard; he attributed hidden significance to gestures of those talking with him, used letters, numerals and designs, meaningless except as a code to him, was unwilling to talk about his personal problems and circumstances and showed a spotty type of flushing on his face and neck when under marked emotional tension.

He insisted he was not mentally ill and tried to justify his acts and remarks. He knew why he was in jail, knew that he faced a sentence in accordance with the jury verdict, knew he was on trial for his life, recalls his trial, admits that no one is justified in taking anyone else's life,

knows that it is not right to shoot anybody, and what the consequences of his actions might be.

These symptoms, even though they may justify the diagnosis made in this case, which is a medical issue, are not instances or examples of such a lessening of defendant's self control, judgment or discretion as to satisfy the Court that he is mentally ill as defined in the Mental Health Act of 1951. Defendant's symptoms as found by the Commission, indicate by their nature that the diagnosis was purely medical and that when the Commission found the defendant to be "mentally ill" it was using the term mentally ill in a purely medical sense and not in the light of the definition of "mental illness" as contained in the Act. If the contrary is assumed, that is if it be assumed that when the Commission found the defendant mentally ill of dementia praecox and recommended his commitment, it was not making a medical diagnosis solely but it was using the term "mentally ill" in the light of its statutory definition and applying the standard set by the Act, then this Court must reject such findings for they are not supported by the evidence. Such rejection is not capricious or arbitrary. It is the natural conclusion to be drawn from, and the only justifiable interpretation of, all of the acts, words and attitudes of the defendant as found by the Sanity Commission and disclosed by the record.

Some of these acts, words and attitudes, such as touching his forehead, touching the person he is talking to and a spotty flushing of the face and neck when under marked emotional tension, may be symptoms of the mental disorder known as dementia praecox. Dr. Meadows said there were "mannerisms such as you see in people mentally ill" (Sanity Commission Record page 88) and Dr. Israel, the psychiatrist member of the Commission, said they were

"mannerisms which appear definitely schizophrenic" in character" (Sanity Commission Record page 95). Such symptoms, however, indicate no lessening of defendant's capacity to use his customary self control, judgment or discretion. Such mannerisms may be significant and have weight in making a purely medical diagnosis that some particular mental illness exists, dementia praecox of the paranoid type in the defendant's case, but they do not indicate a mental illness as defined in the 1951 Act. They do not show defendant's capacity to exercise his customary self control, judgment and discretion to be so lessened as to make it necessary or advisable for him to be under care.

Other actions, words and attitudes of the defendant, as found by the Commission and disclosed by the record, such as outbursts of anger, physical self abuse, disassociated thinking, a pseudo-philosophical attitude not in keeping with his circumstances, piling up furniture and refusing to cooperate with his guards, and being careless of personal possessions and slovenly in his personal habits, while they do concern defendant's ability to exercise judgment, discretion and self control, do not, in the Court's opinion, show that his capacity to use his customary self control, judgment and discretion is so lessened by a mental disorder as to make it necessary or advisable for him to be under care.

Therefore, assuming that the aforementioned words, actions and attitudes of the defendant disclosed symptoms which justified the Commission in making its medical diagnosis that the defendant was, in the words of Dr. Israel, suffering from a paranoid type of dementia praecox (Sanity Commission Record page 97), the Court cannot find from the Commission's Report or from the entire record of the case, that such mental disorder so lessened defendant's ca-

pacity to use his customary self control, judgment or discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care.

"In the entire record of the defendant's behavior since his conviction by the jury on May 25, 1954, there are only two instances of a definite loss of self control. On the first occasion he piled up the furniture in the jail, climbed on top, reflected light on the ceiling and used foul and abusive language toward his guards and refused to come down for some time. He was asked about this episode by the Commission and testified: "When you are in a place for a period of time, things get monotonous and you have to make a few changes in your routine, change things around some". (Sanity Commission Record page 50). He also said, "I was exercising, changing things around to a certain extent more or less. I read a great deal when I was first confined there but it got so I couldn't concentrate on reading to a great extent, so I changed my activities and changed things around somewhat naturally." (Sanity Commission Record page 63). He was asked whether there was any change in his actions while he was in jail and the record shows the following:

> Q. Did you feel that there was any change in your actions while you were in jail?
>
> A. Some people you like to have come better than others. Some people you can talk to better than others and pass the time.
>
> Q. Did you feel that you were acting very differently?
>
> A. Oh, definitely. When I first went in there I was in bed most of the time. Later on I became more active. You have to do something, more or less for exercise so you can sleep at times more or less or you really would go around in a circle.
>
> Q. Do you feel that you got to going around in a circle at all?

A. It depends on what kind of a circle, more or less. Naturally I couldn't exercise. I didn't have an open air bull pen. It was an enclosed partition. That is all you can do, the best you can.

Q. Can you recall writing a serious (?) of disconnected letters on the wall of the cell?

A. It might be disconnected to you, but it was more or less abbreviations of different things to me. I go to contemplating different things mostly. For instance, I am certain one was BSA, Boy Scouts of America. Different initials. Certainly I wrote it down. Is that an unsound mind or what? Naturally you have time to contemplate on things. You are busy and don't have much time to contemplate back on things but I had plenty of time to stop and look back.

Q. So that these letters to you were really abbreviations of things you were thinking about?

A. Oh, yes. (Sanity Commission Record pages 54-55).

The second occasion occurred while defendant was temporarily at the Warren State Hospital for purposes of examination by the Sanity Commission. He became angry when not allowed to go out on a Wednesday afternoon when other patients were allowed to go out. He became sulky, unreasonably demanding, concerned with sexual matters, abusive in language and uncooperative. Dr. Israel described this episode as: "Another exacerbation of his symptoms of a pattern similar to those shown at the time he first entered this institution". (Sanity Commission Record page 95).

These two brief instances, which were in part at least stimulated by the stress of his confinement, of which there is no evidence of any reoccurrence in the record, can hardly be taken as indicative of any general lessening in defendant's capacity to use his customary self control, judgment and discretion. A repetition of such episodes could have been readily observed by anyone having close supervision

of the defendant, with or without medical training, and the testimony of the prison guards who were in charge of the defendant and have had him under close supervision at all times shows no repetition of such episodes since August of 1954.

The guards above referred to had charge of the defendant in the Western State Penitentiary where he has been confined since April 19, 1955 and where he is still confined. Their testimony was heard by the Court at the request of counsel for the Commonwealth under the following circumstances. The Supreme Court handed down its Opinion in this case on October 4, 1955. On November 10, 1955, counsel for the Commonwealth told the Court in Chambers that inasmuch as the Supreme Court's Opinion directed the lower Court to re-examine the Sanity Commission's findings and recommendation and to reconsider the evidence together with any additional relevant evidence, and inasmuch as the defendant was last seen by the Sanity Commission in August, 1954 and there was nothing in the record to show his conduct or behavior during the fifteen months or more which had elapsed since that time, that therefore counsel proposed to submit testimony as to defendant's behavior during the interim. Counsel further told the Court that, believing such evidence might be helpful to the Court in applying the standard set by the Supreme Court, he had asked for and had been receiving weekly summaries of daily reports made by the guards in the Western State Penitentiary as to defendant's conduct there; that no unusual or abnormal conduct on the part of the defendant had been noted and counsel proposed to have these guards appear in Court and testify to that effect. Counsel then requested this Court to set a date for a hearing for this purpose and the Court immediately telephoned defendant's counsel,

Thomas A. Waggoner, Jr., in Uniontown, Pennsylvania, told him of the request for hearing by counsel for the Commonwealth, also the nature and general purport of the testimony to be produced at such hearing, and suggested that a date be agreed upon, far enough in the future so that defendant's counsel would have ample time to determine and prepare any evidence he might desire to produce at the hearing, so that continued hearings would not have to be held. As a part of this telephone conversation, counsel for the defendant and counsel for the Commonwealth agreed on December 12, 1955 as the date for hearing and the Court so ordered.

Those who testified at this hearing, all employees of the Western State Penitentiary, were: The Warden, the prison Doctor, the three guards who had been continuously in charge of the defendant in eight hour shifts around the clock, Monday through Friday and some weekends, a guard who supervised visits from members of his family, and the guard who read all letters written by the defendant in his capacity as mail censor. At the close of the hearing, defendant's counsel told the Court that he had no testimony to offer. He did, however, object to the testimony of defendant's witnesses and to the daily written reports on defendant, all of which was admitted into evidence by the Court and an exception noted for the defendant.

The resident physician at the Western State Penitentiary, Dr. Anthony J. Staab, testified that he made a physical examination of the defendant on his admission to the Western State Penitentiary in April, 1955 and since that date had seen the defendant "at least once a week", that defendant was well nourished and physically active; that aside from an affliction of the middle ear which caused a ringing in the ears, and a few stomach upsets which were

easily controlled, defendant was physically well. The Doctor observed the defendant at times reading in his cell and at times in the exercise-yard playing games with other prisoners (Record pages B 3-8). The Warden, Frank C. Johnson, saw the defendant on his admission on April 19, 1955 and on two other occasions talked with him briefly, once in the recreation yard and once in his cell. The Warden also explained the prison routine followed by the defendant such as the exercise periods from nine o'clock to ten o'clock in the morning and from one o'clock to two o'clock each afternoon; also defendant's activities such as drawing books and magazines from the library, corresponding with his family and friends, purchasing items from the prison commissary; also visits defendant had from members of his family. The prison record showed that defendant was visited once a month, eight times in all, by various members of his family. He was never visited by his counsel. The Warden received daily written reports as to Moon's conduct, made by the three guards who were in charge of him, and these he compiled into a weekly written report which was submitted to counsel for the Commonwealth through the Deputy Commissioner of Correction. The Warden further stated that defendant as visited once each day by someone from the Medical Department, as was every man confined in the Isolation Block, also that the defendant had requested and received visits from the prison Chaplain. The three guards who were in charge of the defendant at all times except some Saturdays and Sundays, testified as to their many contacts and conversations with him and his conduct from day to day. Their testimony showed that they frequently talked with defendant and observed him continuously for almost eight months. They found his conversation and all his

actions to be normal. They noted no unusual or abnormal conduct. Except for a few times when he didn't feel like going out, defendant went out to the exercise yard twice a day where he played hand ball or talked and walked with the other prisoners. During one exercise period defendant told the Warden the ground in the recreation yard was a little bit rough for playing hand ball. The defendant regularly filled out a commissary slip for various items he was allowed to purchase, mostly candy, cake and writing paper. He regularly drew from the library at least three books a week, sometimes six. He subscribed to two magazines, The Argosy and Hunting and Fishing. He had access to and read other magazines such as Life and Time. He shaved at least every other day, bathed every day when allowed to and generally had a haircut once a month. He didn't smoke and asked if he could exchange the tobacco which was furnished to him free by the prison for stationery. The daytime guard, Lieutenant George P. Partridge (record pages B-21-28) saw the defendant at least five times every day and talked with him on many occasions. The other guards were Sergeant Harry J. Kaey who had charge of defendant from four in the afternoon until midnight which was the shift which included the talking period from five p.m. to seven p.m. He checked on the defendant by observation about twenty-five times during each eight hour shift and observed his conduct (record pages B-29-34); and Kenneth Bailey who relieved Sergeant Kaey at midnight, had charge of defendant from midnight until eight o'clock in the morning when he was relieved by Lieutenant Partridge. He also checked on the defendant by observation about twenty-five times during his eight hour shift and had some conversations with him. These three guards, and the Warden, were asked by the

Court, if, at any time when they were conversing with or observing the defendant, they noticed anything which would indicate a lack of self control, or judgment or discretion on the part of the defendant, and they all answered "No". They also testified that no one had ever made a complaint as to any misconduct on the part of the defendant.

Lieutenant Regis J. King testified that he received the defendant when he was transferred to the Western State Penitentiary, photographed him and supervised a bath, haircut and change into prison garb. On two occasions, April 25th and October 14th of 1955, Lieutenant King supervised visits which defendant received from his family, his mother and brother being there on the first occasion and his father on the second. There were no restrictions on defendant's visiting privileges and these visits lasted about thirty to thirty-five minutes under the constant supervision of Lieutenant King. This witness was asked by the Court if he saw anything at all in the way of conduct on the part of the defendant, by action, or word, or otherwise which would indicate any lack of self control, or judgment, or discretion. He replied "No, Your Honor, I didn't" (record page B-44). The last witness on behalf of the Commonwealth was William E. Holmes who was mail censor of the prison. He read all letters written by the defendant, which were about sixty in number. The defendant wrote to his father, mother, brothers, an aunt and to a former employer. Nothing unusual was noted in any of these letters. No items were included which had to be stricken out. This witness was asked by the Court whether he noticed anything in connection with these letters which might indicate a lack of self control, or judgment, or discretion on the part of Norman Moon and he replied "no".

In addition to the numerous and continuous opportunities which these guards had for contact with and observation of the defendant, the record discloses that they were all employees of long standing at the Western State Penitentiary. The Warden had been associated with the Western State Penitentiary for six years; Lieutenant Partridge for tweny-nine years and five months; Sergeant Kacy for five years; Lieutenant King for thirty-two years and William Holmes for thirty-two years.

While the Court would have reached its conclusion that defendant's capacity to use his customary self control, judgment and discretion has not been so lessened by a mental disorder as to make it necessary and advisable for him to be under care, without the testimony produced by the Commonwealth at the hearing on December 12, 1955, such evidence is clearly admissible. Com. v. Wireback, 190 Pa. 138; Com. v. Gearhardt, 205 Pa. 387; Com. v. Cavalier, 284 Pa. 311; Com. v. Carlucetti, 369 Pa. 190; Com. v. Patskin, 375 Pa. 368; and Com. v. Lance, 381 Pa. 293. This evidence qualified as additional relevant evidence which the Supreme Court directed this Court to hear, and the fact that the Commissioner's Report and recommendation which the Supreme Court said must be re-examined, as well as the evidence which must likewise be reconsidered, referred to the defendant's condition more than fifteen months ago, makes such evidence of considerable value to the Court in determining the current situation as to the issues to be decided.

The issue is basically medical for it involves first the question as to whether the defendant is afflicted with a recognized mental disorder. When the Commission in this case found the defendant afflicted with dementia praecox

of the paranoid type, the additional finding that he was a proper subject for commitment to a mental hospital was well justified as a medical matter for no doctor worthy of the name could make such a diagnosis without recommending treatment, in view of the progress which has been made by the medical profession in connection with the cure of such conditions. The second question involved, to-wit: Is defendant's capacity to exercise his customary self control, judgment and discretion lessened by such mental disorder, is likewise largely a medical matter; but the final and conclusive question: Has defendant's capacity to use his customary self control, judgment and discretion been thus lessened to such an extent or degree as to make it necessary or advisable for him to be under care, is not a medical matter and this question may be intelligently answered not only by psychiatrists and doctors but by experienced laymen who have had sufficient contact with and opportunity to observe the conduct of the defendant, such as the prison guards who testified in this case. Their testimony has been valuable to the Court, which, as said by the Supreme Court, must be satisfied that defendant is mentally ill under the standard prescribed, before ordering a stay of proceedings and defendant's commitment to a mental hospital.

For the reasons set forth, the Court is not satisfied that defendant is mentally ill as defined in the Mental Health Act of 1951 and the standard set by the Supreme Court in this case, and therefore enters the following Order:

ORDER

And now, January 28, 1956 the Court having reexamined the findings and recommendation of the Sanity Commission appointed in this case, and having reconsidered the evidence together with additional relevant evidence, as directed by the Supreme Court of Pennsylvania, and for the reasons set forth in the foregoing Opinion, and upon consideration of the entire record in the case, and the Court not being satisfied that the defendant is mentally ill as defined in the Mental Health Act of 1951 and the standards set by the Supreme Court in this case, it is hereby

Ordered that proceedings in this case shall continue and any additional reasons for a new trial shall be filed forthwith.

BY THE COURT

(s) ALEXANDER C. FLICK, JR.
P. J.

EXHIBIT E

Appendix E

Commonwealth of Pennsylvania
DEPARTMENT OF WELFARE
Bureau of Mental Health
Harrisburg

COMMONWEALTH,
vs.
NORMAN W. MOON,
A Prisoner Alleged to be Mentally Ill.

In the Oyer and Terminer Court of Warren County
February Term, 1954
No. 1.

PETITION FOR COMMITMENT TO A HOSPITAL FOR MENTAL DISEASES

To the Honorable, the Judges of the said Court:

The petition of L. E. Linder respectfully represents:

1. That he is the Sheriff and Keeper of the Warren County Jail.

2. That Norman W. Moon is a prisoner in said penal institution, being retained therein on a charge of Murder in the first degree having been found guilty by jury trial with penalty fixed at death.

3. That your petitioner believes and therefore avers that the mental condition of the prisoner has substantially deteriorated since the day of his trial and conviction, and he is now mentally ill or in such condition as to make it necessary that he be cared for in a hospital for mental diseases.

4. That your petitioner avers that said prisoner is not a mental defective.

WHEREFORE your petitioner prays the Court to order an inquiry into the prisoner's condition either by two quali-

fied physicians or by a commission in the discretion of the Court.

And he will ever pray, etc.

L. E. LINDER.

ORDER

And now, to wit, this 31st day of July, 1954, upon consideration of the within petition, the Court appoints Robert H. Israel, Supt. of Warren State Hospital, W. S. Walters, M. D. of Warren, Pennsylvania, R. Pierson Eaton, Esq. an attorney of Warren, Penna., } as a Commission { to investigate the condition of Norman W. Moon the prisoner named in said petition and make report thereof in writing to the Court.

And it is further ordered, if the Commission finds it necessary in order to make a sufficient psychiatric examination of Norman W. Moon, that he be removed to a mental hospital with adequate equipment and the Commission is hereby authorized to direct the Sheriff of Warren County to remove said prisoner from the Warren County Jail to the Warren State Hospital where such examination may be made, and at the conclusion thereof to return him to the Warren County Jail; and this order shall be sufficient authority for the transfer of said prisoner to and from Warren State Hospital and his temporary commitment thereto as may be required by such Commission.

ALEXANDER C. FLICK, JR.,
P. J.

(SEAL)

EXTRACT FROM THE RECORD:
Ralph E. Sires, Clerk of Courts,
Warren County, Pennsylvania.

Appendix F

REPORT AND FINDINGS OF SANITY COMMISSION.

IN THE
COURT OF OYER AND TERMINER OF WARREN COUNTY, PENNA.

COMMONWEALTH,
vs.
NORMAN W. MOON. } No. 41 February Sessions, 1954.

To the Honorable, the Judge of said Court:

Pursuant to order of your Honorable Court dated July 31, 1954, appointing a Commission to investigate the condition of Norman W. Moon, a prisoner detained in the Warren County jail and by commitment of said Court on the same date removed from said jail to Warren State Hospital for examination, and at the conclusion thereof to be returned to Warren County jail, we the undersigned members of said Commission respectfully submit the following report:

1. Examination of the record in the above case as of the date of appointment reveals that Norman W. Moon is a prisoner at Warren County jail under conviction of murder in the first degree.

2. This Commission was duly sworn to the performance of its duties by the Clerk of said Court and thereafter held meetings at Warren State Hospital, North Warren, Pennsylvania, on August 5, 1954, on August 11, 1954 and September 7, 1954, and heard evidence as it required relating to the mental condition of Norman W. Moon. On September 27, 1954, the Commission received a statement in accord

ance with the Mental Health Act from Samuel D. Braemer, Esq., counsel for the defendant.

3. Statutory notice was given of the proceedings and meetings in accordance with law.

4. During the course of the inquiry, this Commission examined the warden and guards of the Warren County jail (August 5, 1954). The Commission examined the defendant (August 11, 1954). The Commission examined the psychologist and psychiatrist at Warren State Hospital (September 7, 1954), and received a statement in the nature of testimony from the counsel for the defendant (September 7, 1954). The Commission also made record as part of the testimony of the several Commissioners' examination of the prisoner and relevant records, as well as such testimony as was available from personal knowledge of the defendant by any of the Commissioners. Transcript of all of the foregoing was made and is on file in the case at the above number and term and a recitation of the contents is deemed unnecessary.

5. In accordance with the order of Court dated August 4, 1954, neither counsel for the defendant nor counsel for the Commonwealth was present when your Commissioner examined the defendant and witnesses, and the defendant and all of the witnesses were examined severally before the Commission without others being present.

6. The defendant is a male adult of approximately twenty-nine years, well built and physically normal without evidence of disease, illness or injury except for a scar on the neck and the left side of the head (85).

7. The Commission finds the following facts:

On and after May 25, 1954, while Norman W. Moon was a prisoner at Warren County jail, he appeared

normal to the warden and guards of Warren County jail, Donnell Allen, Joseph Sullivan, Robert L. Anderson, A. M. McDannel and Rayburn Haynes. Dr. Walters, a member of this Commission, and the physician for Warren County jail, found that Moon manifested no abnormalities until about two weeks prior to the appointment of the Commission.

Within about three weeks of the appointment of the Commission there was a gradual change in Moon, particularly after visits from his attorney and his family, such as outbursts of anger, refusal to keep clean and shaved, insistence on leaving the lights on all night, sitting around in the nude, playing with his food, writing undecipherably on the walls of the cell, indulging for the first time in filthy language, physical self abuse, irritation for the first time with the guards, carelessness of personal possessions and from the statements of the guards a changed man from the person they knew as of May 25, 1954.

On July 31, 1954, he created a disturbance in the jail, had piled furniture on the table and was sitting on top of the pile with a book or magazine for almost three hours, waving at a light and babbling. His conversation at this time was not understandable. At about 5:00 A. M. Dr. Walters gave him a sleeping tablet which he took and shortly thereafter he was taken to the Warren State Hospital under order of your Court.

Norman W. Moon is not mentally defective.

He has from admission at Warren State Hospital shown a behavior pattern of irrelevant and garrulous conversation with rigid outward emotional control and

unusual habit of touching his forehead, over concern with religious matters without emotional feeling therefor, at times dissociated thinking process, a pseudo philosophical attitude not in keeping with his circumstances, unreasoning demanding in what he conceives to be his rights, indulging in conversational pattern stimulated almost entirely by his external surroundings, entire evasiveness as to previous behavior, a touching compulsion, spontaneous evasion of questions, peculiar, unnatural and spontaneous word association such as in his discussion with Dr. Israel when the doctor said that his principal job was administration and Moon immediately responded "So you are trying to tell me that I must become a woman"; his accusation against Mr. McDannel who had shown Moon an Erie paper containing an article saying that a number of men had been laid off by one of the Erie plants, and Moon's resentful inference that McDannel thought Moon responsible for these men being thrown out of work and bitterly resenting the accusation; a spotty type of flushing on the face and neck when under marked emotional tension; his attribution of hidden significance to gestures of those talking with him; his use of letters, numerals and designs which are meaningless except as a code to him; his total unwillingness amounting to an inability to discuss his personal problems, the reason for his detention, the consequences of his conviction, and the completely split reaction to what is considered right for himself and right for the public in general.

He is insistent that he is not mentally ill and tries to justify his actions and remarks.

He knew why he was in jail (Testimony, Pages 19, 66), knew that he faced a sentence in accordance with

the jury verdict (Page 25), knows that he is on trial for his life (Pages 50, 88), recalls his trial (Page 55), admits that no one is justified in taking anyone else's life (Pages 56, 57, 77), knows that it is not right to shoot anybody (Pages 59, 62), and what the consequences of his acts might be (Pages 59, 61).

He has exhibited on two occasions periods of acute mental disturbance; the first time in the jail at the time of his commitment and the second time while in the hospital after the Commission first met. On both occasions his disturbance promptly subsided.

8. From the above facts as well as the testimony offered to the Commission and the Commission's own professional views as qualified, the Commission finds in Norman W. Moon well marked symptoms of psychosis.

9. Conversation which Commission members had with Moon together with the psychiatric and psychological report indicate clearly the facts above stated. Norman W. Moon knows who he is, knows that he is detained in jail because of crime which he committed, comprehends the commonly accepted standards of social conduct but avoids their application to himself. He is not entirely bereft of his senses, his mentality has not been obliterated nor is he totally lacking in understanding, but what he knows, comprehends and understands is obviously colored, clouded and distorted by his mental illness. He is aware of surroundings and his relationship to them but at the same time there is a dissociation of the person, a splitting of the ego and a retreat from reality so that he lives in fact in a dream world with little relation to his own precarious position in society and with a flat emotional unconcern over such position.

10. The Mental Health Act of 1951 (50 Purdon 1202) provides that this Commission report to the Court as to whether or not they find that Norman W. Moon is in fact mentally ill and a proper subject for commitment to a hospital. From the facts above stated and also from the testimony taken before the Commission and filed in said case, this Commission finds as follows:

a. Normal W. Moon is in fact mentally ill.

b. Norman W. Moon's mental illness is that of dementia praecox of the paranoid type.

c. This illness is chronic and continuing.

d. Norman W. Moon is a proper subject for commitment to a mental hospital.

11. The Commission further finds in accordance with the Mental Health Act (50 Purdon 1224) that Norman W. Moon is not a mental defective as defined in said Act.

12. The Court requested of this Commission on October 8, 1954, that it give consideration to the following points, and the Commission, having considered those points, reports:

(1) Regardless of what Moon's ideas or his feelings may be as to his own acts or behavior and although he may have a mental abnormality or illness, has he sufficient intelligence or mental ability to comprehend that by generally accepted standards an unjustifiable and inexcusable killing is considered to be wrong and a crime?

Answer. Yes, except during the two periods of acute mental disturbance that he has exhibited.

(2) Regardless of what Moon's ideas or his feelings may be as to his own acts or behavior and although he may have a mental abnormality or illness, has he sufficient intelligence or mental ability to comprehend that he has

been tried by a jury which found him legally responsible for such a killing and guilty of murder in the first degree, and the jury also set death as the penalty which it felt was the proper one in his case?

Answer. Yes, except during the two periods of acute mental disturbance that he has exhibited.

(3) Regardless of what Moon's ideas or his feelings may be as to his own acts or behavior and although he may have a mental abnormality or illness, has he sufficient intelligence or mental ability to comprehend that if the penalty set by the jury is carried out and he is sent to the electric chair, it will be in punishment for the crime of which the jury found him guilty?

Answer. Yes, except during the two periods of acute mental disturbance that he has exhibited.

Respectfully submitted,

(s) ROBERT H. ISRAEL, M. D.
(s) WILLIAM S. WALTERS, M. D.
(s) R. PIERSON EATON, ESQ.

(SEAL)

EXTRACT FROM THE RECORD

RALPH E. SIRES,
Prothonotary,
Clerk of Courts.